(1)
Supreme Court, U.S.
FILED

No. 98-

98 504 SEP 24 1998

IN THE

OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1998

VICTOR TORRES, ET AL.,

Petitioners,

v.

COMMISSIONER OF CORRECTION, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

JOHN REINSTEIN
American Civil Liberties
Union of Massachusetts
99 Chauncy Street
Boston, Massachusetts 02111
(617) 482-3170

SCOTT P. LEWIS
Counsel of Record
LAURIE S. GILL
LORI B. SILVER
PALMER & DODGE LLP
One Beacon Street
Boston, Massachusetts 02108
(617) 573-0100

Counsel for Petitioners

September 24, 1998

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

117 pp

QUESTION PRESENTED

Did the Supreme Judicial Court of Massachusetts err in holding, contrary to this Court's controlling case law and the prevailing view in the Circuit Courts of Appeals, that expert psychiatric testimony establishing that inmates have suffered, and can be expected to suffer, serious mental illness as a result of the isolated conditions of confinement in a "supermax" prison is constitutionally irrelevant in reviewing petitioners' Eighth Amendment challenge?

LIST OF PARTIES

The petitioners in this case are Victor Torres, Corey Glover, Mark MacDougall, Michael Leoney, Basil Williams, William Dinkins, William Robinson, Keith Parkinson, Adrian Almeida, Jerrell Bunce and Charles Chase.

The respondents are Michael Maloney, Commissioner of Correction for the Massachusetts Department of Correction and formerly Deputy Commissioner of Correction, individually and in his official capacity; Larry E. DuBois, formerly the Commissioner of Correction, individually; the current Deputy Commissioner of Correction, in his official capacity; Ronald Duval, formerly Superintendent of the Massachusetts Correctional Institution at Cedar Junction ("MCI-Cedar Junction"), individually; the current Superintendent of MCI-Cedar Junction in his official capacity; Phillip L. Harrington Jr., formerly the Director of the Department Disciplinary Unit at MCI-Cedar Junction, individually; the current Director of the Department Disciplinary Unit at MCI-Cedar Junction, in his official capacity; and Edwin Doolin, correctional officer at MCI-Cedar Junction, individually.

TABLE OF CONTENTS

Question Presented i

List of Parties ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 2

A. The Punitive Purpose and Harmful Effects of DDU Confinement 4

B. The Proceedings Below 8

C. How the Federal Question Was Raised 10

Reasons for Granting the Writ 10

I. The Supreme Judicial Court's Holding That Expert Evidence of Psychiatric Harm Is Irrelevant in Determining Whether Long-Term Isolated Confinement Violates the Eighth Amendment Is in Conflict With Controlling Precedents of This Court and Many Courts of Appeals 10

II. The Question Presented Has National Importance 17

Conclusion 20

TABLE OF AUTHORITIES

CASES:

Copeland v. *Lanham*,
1994 WL 64748 (4th Cir. 1994) (unpublished decision) 12

Del Raine v. *Williford*,
32 F.3d 1024 (7th Cir. 1994) 13

Farmer v. *Brennan*,
511 U.S. 825 (1994) 8, 8n

Ferdik v. *Gaspar*,
1994 WL 127166 (9th Cir. 1994) (unpublished decision) 12

Goldyn v. *Moran*,
1997 WL 545484 (9th Cir. 1997) (unpublished decision) 12

Hamilton v. *Leavy*,
117 F.3d 742 (3rd Cir. 1997) 12

Helling v. *McKinney*,
509 U.S. 25 (1993) ..... *passim*

Hickey v. *Reeder*,
12 F.3d 754 (8th Cir. 1993) 14n

Inmates of Occoquan v. *Barry*,
844 F.2d 828 (D.C. Cir. 1988) 17

Inmates of Occoquan v. *Barry*,
850 F.2d 796 (D.C. Cir. 1988) 17n

Jackson v. *Meachum*,
699 F.2d 578 (1st Cir. 1983) 14n

Jacobs v. *Young*,
1997 WL 809925 (6th Cir. 1997) (unpublished decision) 11, 12

Jensen v. *Clarke*,
94 F.3d 1191 (8th Cir. 1996) 13

Jordan v. *Gardner*,
986 F.2d 1521 (9th Cir. 1993) 16

LaBounty v. *Coughlin*,
137 F.3d 68 (2nd Cir. 1998) 12

Madrid v. *Gomez*,
889 F. Supp. 1146 (N.D.Cal. 1995) 14n, 16

Oliver v. *Deen*,
77 F.3d 156 (7th Cir. 1996) 13

Rhodes v. *Chapman*,
452 U.S. 337 (1981) 4, 15, 16, 17n

Santana v. *Collazo*,
714 F.2d 1172 (1st Cir. 1983) 14n

Taylor v. *Michigan Department of Corrections*,
69 F.3d 76 (6th Cir. 1995) 16

Torres v. *Commissioner of Correction*,
427 Mass. 611, 695 N.E.2d 200 (1998) 1

Waldrop v. *Evans*,
871 F.2d 1030 (11th Cir. 1989) 16

Wilson v. *Seiter*,
501 U.S. 294 (1991) 8n

CONSTITUTION, STATUTES AND RULES:

U.S. Const. Amend. VIII ..... *passim*

28 U.S.C. § 1257(a) (1993) 2

Mass. Regs. Code tit. 103, § 430.09(2) (1993) 5

Mass. R. Civ. P. 54(b) 2, 9

Mass. R. App. P. 11 9

OTHER AUTHORITY:

Lisa Anderson, *Is 'Supermax' Too Much? Strict Isolation of Inmates Called Cruel, Ineffective,* CHI. TRIB., Aug. 2, 1998 at 1 ..... 17n

Adrian Angold, *Seclusion*, 154 BRIT. J. PSYCHIATRY 437 (1989) 19n

Peter Annin, *Inside the New Alcatraz*, NEWSWEEK, July 13, 1998, at 35 ..... 17n

Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 CAL. W.L. REV. 265 (1977) 18

Andrea Estes, *SJC rules solitary cells not cruel*, BOSTON HERALD, June 6, 1998, at 6 ..... 19n

Stuart Grassian, M.D., *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983) 6n

Craig Haney, *"Infamous Punishment": The Psychological Consequences of Isolation*, NAT'L PRISON PROJ. J. 3 (Spring 1993) 19n

Human Rights Watch, COLD STORAGE: SUPER-MAXIMUM SECURITY CONFINEMENT IN INDIANA 71 (1997) 18n

Martin Humphreys & Frances Burnett, *Mono-symptomatic Hypochondriacal Psychosis and Prolonged Solitary Confinement*, 34 MED. SCI. & L. 343 (1994) 19n

Jeff Mitchell, M.D., and Christopher Varley, M.D., *Isolation and Restraint in Juvenile Correctional Facilities*, 29 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 251 (1990) 19n

Nightline Special Edition: Crime & Punishment, Part III, Blood In, Blood Out (ABC television broadcast, Aug. 27, 1998) *available in* Westlaw, database ALLNEWS, 1998 WL 9100174 ..... 17n

Dorte Maria Sestoft et al., *Impact of Solitary Confinement on Hospitalization Among Danish Prisoners in Custody*, 21 INT'L J.L. & PSYCHIATRY 99 (1998) 18n

Kate Shatzkin, *Supermax or Super Cruel?*, THE BALTIMORE SUN, May 19, 1996 at 1E 17n

No. 98-

In The

Supreme Court of the United States

October Term, 1998

VICTOR TORRES, ET AL.,

Petitioners,

v.

COMMISSIONER OF CORRECTION, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts ("Supreme Judicial Court," or "S.J.C.") is reported at 427 Mass. 611, 695 N.E.2d 200 (1998), and is reprinted as Appendix A (App. A1). The opinion of the Superior Court of Suffolk County partially granting respondents' motion for summary judgment is unreported and is reprinted as Appendix B (App. A13). The order of the Superior Court directing the entry of partial final

judgment under Mass. R. Civ. P. 54(b) is unreported and is reprinted as Appendix C (App. A84). The order of the Supreme Judicial Court denying petitioners' timely petition for rehearing is unreported and is reprinted as Appendix D (App. A87).

JURISDICTION

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on June 5, 1998. *See* App. A1. On June 26, 1998, the Supreme Judicial Court denied petitioners' timely petition for rehearing. *See* App. A87. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) (1993).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

This case arises from one of the most profound changes in the American penal system in recent years: the widespread and increasing use of so-called "supermaximum" security prisons, sometimes referred to as "control units." These units are the culmination of the most restrictive trends in prison architecture, correctional management and social control. Although purporting to be justified to control violent and predatory inmates, "the worst of the worst," they

have become the quick fix for dealing with prisoners who are disruptive, dangerous, mentally ill or simply critical of prison officials. These prisons are different in kind and in degree from the penal institutions that have preceded them, a uniquely American *gulag* designed to punish the prisoners confined in them by subjecting them to conditions of extreme social isolation and sensory deprivation.

The petitioners are prisoners who have been confined in the Massachusetts Department of Correction's supermax prison, the Department Disciplinary Unit ("DDU"). It is the most restrictive prison setting in Massachusetts. Prisoners in the DDU are held in solitary confinement for at least 23 hours a day for prolonged periods as long as ten years. Their contact with the outside world and with other prisoners is strictly controlled and infrequently permitted. They are not allowed to participate in group activities of any kind and have no access to educational, vocational or other rehabilitative programs. As a result of their confinement in this unit, inmates endure years on end of physical, social and emotional isolation. The petitioners claim that long-term solitary confinement in the DDU, with its attendant social isolation and sensory deprivation, violates the Eighth Amendment because it poses a substantial risk of serious psychological injury and has in fact resulted in such harm.

In affirming summary judgment for the respondents on the petitioners' Eighth Amendment claim, the Supreme Judicial Court held that evidence of the effects of long-term solitary confinement is irrelevant in considering claims under the Eighth Amendment. Summary judgment was appropriate, it concluded, because there was no dispute concerning the physical conditions in the DDU, and solitary confinement, even for "very lengthy periods," does not violate the Eighth Amendment as a matter of law. App. A6. This peti-

tion asks the Court to decide whether a court may ignore expert testimony that long-term solitary confinement causes serious mental illness and instead rule as a matter of law that such confinement does not violate the Eighth Amendment.

Ignoring the controlling precedent of this Court in *Helling* v. *McKinney*, 509 U.S. 25, 34-35 (1993), and the decisions of at least six Federal Circuit Courts of Appeals that have correctly applied *Helling*, the S.J.C. held that a dispute presented by competing expert affidavits about the effect of long-term confinement in the DDU raised only an issue of law, rather than an issue of fact, that could properly be resolved by the trial court on a motion for summary judgment. The S.J.C. misapprehended this Court's decision in *Rhodes* v. *Chapman*, 452 U.S. 337, 348 n.13 (1981), and simply ignored the affidavit of petitioners' psychiatric expert, who concluded – based on thoroughly documented clinical observations – that long-term solitary confinement and sensory deprivation in the DDU had inflicted and could be expected to continue to inflict serious psychological harm on inmates.

A. *The Punitive Purpose and Harmful Effects of DDU Confinement.*

The Massachusetts Department of Correction ("DOC") acknowledges that the DDU was created in 1992 to "deter future disciplinary violations and to punish inmates."[1] Re-

---

[1] The building housing the DDU was originally designed to replace the administrative segregation unit at MCI-Cedar Junction. Apparently seeking to avoid state court orders that held that the DOC could not deny prisoners in administrative segregation privileges and programs otherwise available to inmates in the general population, the DOC renamed the facility the "Department Disciplinary Unit" and proceeded to limit

spondents' Brief in the S.J.C. at 7. Prisoners in the DDU are locked alone in their cells for at least 23 hours a day for prolonged periods. Petitioners received DDU sentences ranging from a year and a half to six and a half years. While confined in the DDU, prisoners have no interaction with inmates in the general population, and their interaction with each other is extremely limited. DDU cells, measuring about seven by twelve feet, each have a solid steel door with a single narrow window facing an internal concrete wall, effectively preventing DDU inmates from seeing other inmates and severely limiting communications. DDU prisoners eat all of their meals alone in their cells. They may not participate in any educational, rehabilitative or religious programs. Their only respite from perpetual solitary confinement is a single hour of exercise, for a maximum of five days per week, in a bare, seven by thirty-five foot outdoor space entirely enclosed by a chain link fence. The isolation of DDU prisoners is reinforced by DOC policies that severely and deliberately restrict their access to sensory stimulation and to human contact of any kind.[2]

DDU inmates to even fewer privileges than they had in the administrative segregation unit before the court orders had taken effect. The harmful effect of these isolated conditions is exacerbated by the fact that inmates may be sentenced to the DDU for as long as ten years through an essentially arbitrary process that provides no standards for the determinations about whether an inmate should be sentenced to the DDU, or if so, for how long. DOC "disciplinary officers" can refer an inmate to a DDU hearing for any alleged disciplinary violation they deem to be "major." *See* Mass. Regs. Code tit. 103, § 430.09(2) (1993).

[2] During the first thirty days that inmates are confined in the DDU, they are not permitted to have a radio or television and they are denied all visitation and telephone privileges. If inmates remain free of new disciplinary reports for the first thirty days, they may obtain permission

There is no significant dispute about the actual physical conditions of confinement in the DDU or the applicable policies and practices of the DOC. What was, and is, vigorously disputed is whether those conditions of confinement have caused serious mental harm or pose an intolerable risk of serious mental harm to the inmates confined in the DDU. Petitioners' psychiatric expert, Dr. Stuart Grassian, documented the harmful effects of confinement in the DDU.[3] Dr. Grassian testified in his affidavit that "DDU confinement has seriously or even dramatically exacerbated a previously existing psychiatric illness; in other cases DDU confinement precipitated a mental illness where none had been observed before." S.J.C. Appendix ("S.J.C. App.") 459. Dr. Grassian also described numerous instances of harm to individuals confined in the DDU. For example:

> • One inmate had no prior history of psychiatric illness before incarceration in the DDU. After one year in the DDU, he began hearing

---

to have a radio, one telephone call and one non-contact visit during the next thirty day period. Only after 120 days with no disciplinary reports are inmates eligible for the maximum privileges ever afforded: a television, a radio, four telephone calls and four non-contact visits a month. Inmates who violate the DOC's rigidly enforced rules, however, have often spent months or years in a DDU cell without any visits, telephone calls, radio or television.

[3] Dr. Grassian has been a board-certified psychiatrist and faculty member at the Harvard Medical School for more than 20 years. He is an expert on the psychological effects of solitary and small group confinement in prisons, and he has written one of the leading articles in the field. *See* Stuart Grassian, M.D., *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983).

voices, saving his urine and feces in cups, rocking back and forth in his cell and banging his head on the steel door. He also became reluctant to eat and drink out of fear that his food was being poisoned.

- Another inmate began hearing voices, including that of his dead father, and on several occasions attempted to inflict self-harm by refusing to eat, attempting to bite off his finger, and slamming his head repetitively against a cell wall. Although staff at the psychiatric hospital to which the inmate was transferred concluded that he was unable to tolerate DDU confinement, the DOC ignored the recommendation and returned him to the DDU. Within 24 hours of his return to the DDU, the inmate slashed open his left arm in a suicide attempt.

- Several other inmates evaluated by Dr. Grassian could be maintained in the DDU only by use of antipsychotic medication, which they had never before required and which has the potential to cause permanent neurological harm.

S.J.C. App. 458-459, 462-464, 475-477, 462-482.

B. *The Proceedings Below.*

The petitioners' complaint and amended complaint asserted various state and federal claims, including violations of the Eighth Amendment, and sought injunctive and declaratory relief and damages. After two years of extensive discovery, the respondent prison officials moved for summary judgment on the Eighth Amendment claim. The central question on summary judgment was whether long-term solitary confinement in the DDU presented a substantial risk of serious harm as required by *Farmer* v. *Brennan*, 511 U.S. 825, 834 (1994).[4] Petitioners opposed summary judgment, claiming a right to a trial on the hotly contested issue of the psychological *effects* of long-term confinement in the DDU. They submitted a 107-page affidavit in which petitioners' psychiatric expert, Dr. Stuart Grassian, described the serious mental deterioration inflicted by the DDU. His affidavit contained detailed clinical observations based on interviews and reviews of the medical records of 32 DDU inmates. Dr. Grassian concluded that the conditions of confinement in the DDU have caused severe psychiatric harm to many of the

---

[4] The S.J.C. did not reach the "deliberate indifference" question. *See* App. A6-7. However, the petitioners argued below that no special showing of subjective intent was required because, as the DOC concedes, the DDU was *designed* to punish inmates assigned to it. As this Court has observed, because "punitive isolation is self-evidently inflicted with punitive intent," it is unnecessary to consider the issue of deliberate indifference in such cases. *Wilson* v. *Seiter*, 501 U.S. 294, 301 n.2 (1991). In any event, the DOC's failure to abate the risk of DDU confinement in response to the petitioners' evidence of harm during the pendency of this suit is sufficient to establish respondents' subjective intent for injunctive purposes. *See Farmer*, 511 U.S. at 846 n.9.

inmates confined there and pose a serious risk of harm to inmates who had not yet exhibited symptoms.[5]

The trial court granted the respondents' motion for summary judgment on the Eighth Amendment claim, without even acknowledging the petitioners' evidence of the effects of DDU confinement on their mental health. The trial court's decision contains no mention of Dr. Grassian's affidavit or any of the other disputed evidence of serious mental harm presented by the petitioners. An order directing the entry of partial final judgment under Mass. R. Civ. P. 54(b) was entered with respect to this claim, and the petitioners appealed.

The Supreme Judicial Court accepted petitioners' application for direct appellate review. *See* Mass. R. App. P. 11. The S.J.C. affirmed the grant of summary judgment for the respondents. Although the S.J.C. acknowledged petitioners' argument "that a genuine issue exists as to whether conditions in the DDU pose a 'substantial risk of serious harm,'" it concluded that "whether prison conditions are sufficiently harmful to establish an Eighth Amendment violation, is a purely legal determination for the court to make." App. A4-5.

Despite Dr. Grassian's conclusion that the conditions of confinement in the DDU can cause severe psychiatric harm,

---

[5] This evidence was presented to rebut conclusory affidavits from the respondents who denied that conditions in the DDU caused harm. For example, the Commissioner submitted an affidavit stating, "I do not believe conditions of confinement in the DDU cause or exacerbate existing or latent mental illness . . .." S.J.C. App. 936-37. Respondents also submitted the affidavit of a medical expert. Even though this expert never visited the DDU or interviewed a single inmate confined there, he opined that conditions in the DDU are not restrictive enough to cause harm, and therefore the harm complained of by plaintiffs cannot be occurring in the DDU. S.J.C. App. 2392-95.

the S.J.C. held that Dr. Grassian's testimony went to the ultimate legal question "regarding what constitutes cruel and unusual punishment." App. A5. The court concluded his opinion was "entitled to little weight." App. A4-5.

C. *How the Federal Question Was Raised.*

Petitioners raised the Eighth Amendment claim in their complaint, their amended complaint, in their opposition to respondents' motion for summary judgment and in their briefs to the S.J.C. The S.J.C. specifically addressed and ruled against petitioners on their Eighth Amendment claim. *See* App. A6.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME JUDICIAL COURT'S HOLDING THAT EXPERT EVIDENCE OF PSYCHIATRIC HARM IS IRRELEVANT IN DETERMINING WHETHER LONG-TERM ISOLATED CONFINEMENT VIOLATES THE EIGHTH AMENDMENT IS IN CONFLICT WITH CONTROLLING PRECEDENTS OF THIS COURT AND MANY COURTS OF APPEALS.

The S.J.C.'s decision directly conflicts with controlling precedent of this Court. *Helling* v. *McKinney*, 509 U.S. 25 (1993), held that factual disputes about whether prison conditions pose a substantial risk of serious harm to inmates must be resolved *before* a court can determine as a matter of law whether Eighth Amendment rights have been violated. In *Helling*, a prisoner claimed that forced exposure to envi-

ronmental tobacco smoke posed a substantial risk of serious harm to his future health. 509 U.S. at 28. Recognizing that factual disputes about the risks posed by the conditions of his confinement would have to be resolved at trial before the legal test of the Eighth Amendment could properly be applied, this Court held that it was "premature" to rule as a matter of law that "the risk is not sufficiently grave to implicate a 'serious medical nee[d]'" or that forced exposure to second-hand smoke is consistent with "current standards of decency." *Id.* at 34. Accordingly, the Court determined that the prisoner's complaint should not have been dismissed. *Id.* at 35.

The S.J.C.'s decision also conflicts with the decisions of many of the Circuit Courts of Appeals. After *Helling*, the Courts of Appeals have often ruled that genuine factual disputes about the effects of challenged prison conditions must be resolved before addressing the legal question of whether there has been proof of a sufficiently substantial risk of serious harm to implicate the Eighth Amendment.

The Sixth and Ninth Circuits explicitly relied on *Helling* to reverse grants of summary judgment for defendant prison officials that were comparable to the S.J.C.'s decision in this case. For example, the Sixth Circuit reversed a grant of summary judgment for prison officials on an inmate's Eighth Amendment claims with regard to exposure to environmental tobacco smoke, where the district court had found the evidence "so one-sided that defendants must prevail as a matter of law." *Jacobs* v. *Young*, 1997 WL 809925, *2 (6th Cir. 1997) (unpublished decision). The Sixth Circuit found that the inmate had established a genuine issue of material fact "as to whether [he] faced a substantial risk of serious harm" by presenting his medical records that included references to

the inmate's angina and emphysema, and a physician's recommendation that he share a cell with a nonsmoker. *Id.*

Similarly, the Ninth Circuit has followed *Helling* in allowing inmates to proceed to trial with evidence far less substantial than the expert testimony presented by the petitioners in this case. *See*, e.g., *Goldyn* v. *Moran*, 1997 WL 545484, *2 (9th Cir. 1997) (unpublished decision) (remanding for trial where prisoner alleged she was exposed to environmental tobacco smoke and her underwear was not sanitarily cleaned; defendant prison officials' contentions that underwear cleaning practices at the prison conform to industry standards and that the unit passed Department of Health inspections created disputed issues of fact under *Helling*); *Ferdik* v. *Gaspar*, 1994 WL 127166 (9th Cir. 1994) (unpublished decision) (reversing summary judgment for defendant prison officials where inmate presented his own affidavit and affidavit of cellmate stating that confinement in double-bunked cell worsened his back condition).

Other Courts of Appeals have implicitly adopted the approach dictated by *Helling* in requiring that factual disputes be resolved at trial before the court can decide the ultimate legal question. *See*, e.g., *LaBounty* v. *Coughlin*, 137 F.3d 68, 73 (2nd Cir. 1998) (material issue of fact as to whether plaintiff inmate had been exposed to friable asbestos in prison precludes summary judgment); *Hamilton* v. *Leavy*, 117 F.3d 742, 746-49 (3rd Cir. 1997) (reversing grant of summary judgment for defendant prison officials where inmate raised genuine issue of material fact about whether he was at risk of serious harm from other inmates and whether prison authorities could have taken additional steps to secure his safety); *Copeland* v. *Lanham*, 1994 WL 64748, *4 (4th Cir. 1994) (unpublished decision) (noting that inmate's allegations of risk of sexual assault are "sufficiently serious" to

raise genuine issue of material fact on objective component of Eighth Amendment claim, but affirming summary judgment because of insufficient evidence on subjective prong); *Jensen* v. *Clarke*, 94 F.3d 1191, 1197-98 (8th Cir. 1996) (affirming district court finding, after trial, that random double-celling of inmates resulted in substantial risk of serious harm based on statistics and prisoner testimony).

The Seventh Circuit has rendered conflicting decisions about the proper application of *Helling*. That Court has correctly stated that an inmate plaintiff who raises an issue of material fact about the harm caused by challenged conditions of confinement "is entitled to have the trier of fact determine whether the conditions . . . violate the Eighth Amendment." *Del Raine* v. *Williford*, 32 F.3d 1024, 1034 (7th Cir. 1994). A different panel of the Seventh Circuit, however, affirmed summary judgment in a decision that a dissenting judge characterized as being "in substantial tension" with *Helling*. *Oliver* v. *Deen*, 77 F.3d 156, 164 (7th Cir. 1996) (Woods, J. dissenting).[6]

There is no principled way to reconcile the S.J.C.'s decision in this case with *Helling* or with the decisions of most of

---

[6] In *Oliver*, the plaintiff claimed that his asthma was worsened by exposure to environmental tobacco smoke from his cellmate in violation of the Eighth Amendment. 77 F.3d at 158. The Seventh Circuit affirmed the district court's grant of summary judgment for defendants, on the ground that the inmate's mild asthma did not constitute "a medical need sufficiently serious to implicate the Constitution or to support his claim for damages." *Id.* at 161. The court distinguished *Helling* because the inmate was not seeking injunctive relief and did not claim that environmental tobacco smoke may harm him in the future. *See id.* at 159. The petitioners here are seeking injunctive relief, and have offered substantial evidence that the conditions of confinement have caused and will continue to cause serious harm in the future.

the Courts of Appeals. The S.J.C. attempts to justify its decision by stating that there is "no factual dispute over the conditions endured by DDU inmates," only an "arguable dispute [concerning] the extent to which these conditions generally caused inmates' psychological problems." App. A5. However, the S.J.C. failed to recognize that this was the precise situation at issue in *Helling*: there, the parties did not dispute that the inmate had been exposed to environmental tobacco smoke, but they did dispute the *effects* of that exposure.[7]

The S.J.C.'s refusal to consider the petitioners' expert affidavit was based on the erroneous premise that it could decide whether the challenged conditions were "sufficiently

---

[7] Indeed, the two cases cited by the S.J.C. in support of its "purely legal" approach demonstrate instead that *Helling* provides the proper analysis. *See* App. A5 (citing *Hickey* v. *Reeder*, 12 F.3d 754, 756 (8th Cir. 1993); *Madrid* v. *Gomez*, 889 F. Supp. 1146, 1246 (N.D. Cal. 1995)). Both *Hickey* and *Madrid* reached the legal question of whether the Constitution had been violated only after the plaintiff inmates had a trial on the merits on their Eighth Amendment claims. In *Madrid*, the trial court made painstaking findings of facts about the impact of segregated confinement on inmate mental health before reaching its legal conclusions. *See id.* at 1230-36, 1261-66. In *Hickey*, plaintiff's trial testimony about the pain and fright of being shot by a stungun was not challenged by any contrary evidence. *See* 12 F.3d at 757 n.4 ("no authority or supporting evidence" for the correctional official's position). The *Hickey* Court properly made a legal determination, on undisputed facts, that the pain was sufficiently harmful to violate the Eighth Amendment. The First Circuit has yet to consider the implications of *Helling* in determining whether summary judgment is appropriate in a prison conditions case. Its decisions in *Jackson* v. *Meachum*, 699 F.2d 578 (1st Cir. 1983), and *Santana* v. *Collazo*, 714 F.2d 1172 (1st Cir. 1983), expressing a disinclination to invalidate long-term confinement in isolation units, preceded this Court's decision in *Helling* by a decade and should not have been relied upon by the S.J.C. *See* App. A6.

harmful" to trigger the Eighth Amendment as a "purely legal determination." App. A4-5. This error led the S.J.C. to conclude that the expert's affidavit should be given "little weight," ostensibly on the basis of *Rhodes* v. *Chapman*, 452 U.S. 337, 348 n.13 (1981).

However, *Rhodes* did not foreclose the use of expert testimony to demonstrate substantial harm in prison cases. In *Rhodes*, expert testimony was offered on the ultimate legal question of whether conditions of confinement comport with contemporary standards of decency. The inmates in *Rhodes*, challenging the practice of double-celling as unconstitutional, offered as evidence the "generalized opinions" of experts about desirable prison conditions. 452 U.S. at 348 n.13. The district court relied on that expert testimony to support its conclusion that double-celling violated the Eighth Amendment. This Court reversed, noting that it was wrong to assume that "opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency. . .." 452 U.S. at 348 n.13. *Rhodes* does not, however, authorize courts to ignore expert testimony of the sort petitioners offered here, which addresses the *actual impact* of oppressive prison conditions, not the ultimate legal issue. As Justice Brennan noted in his concurring opinion in *Rhodes*, a court seeking information about challenged conditions of confinement "must be open to . . . expert testimony and studies on the effect of particular conditions on prisoners." 452 U.S. at 363. The Court's opinion did not "disparage use of experts to assist the courts in these functions." *Id.* at 363 n.11.

In fact, in *Helling* this Court recognized that an inmate may offer expert testimony to establish the risk of harm posed by challenged conditions of confinement. *Helling* invited a "scientific and statistical inquiry into the seriousness

of the potential harm and the likelihood that such injury to health" will actually be caused by the conditions of confinement. 509 U.S. at 36. Consistent with these precedents, the petitioners here offered proof, through an expert's affidavit, that long-term confinement in the DDU had caused, and could be expected to continue to cause, serious injury to the mental health of inmates confined there.

The S.J.C.'s decision to ignore the petitioners' expert testimony on the basis of *Rhodes* is in conflict with the overwhelming majority of lower court decisions in Eighth Amendment cases. These courts have routinely accepted expert testimony as competent evidence of the harm likely to befall inmates. *See*, e.g., *Taylor* v. *Michigan Department of Corrections*, 69 F.3d 76, 83-84 (6th Cir. 1995) (reversing grant of summary judgment for defendant where district court erred by rendering decision before expert had submitted report; reversing so expert could testify about risk of harm at prison camp); *Jordan* v. *Gardner*, 986 F.2d 1521, 1526 (9th Cir. 1993) (considering expert testimony describing the psychological effects on abused female inmates of "pat-down" searches by male guards); *Waldrop* v. *Evans*, 871 F.2d 1030, 1035 (11th Cir. 1989) (even where all actions taken by prison psychiatrist were undisputed, he was not entitled to summary judgment because experts' testimony raised genuine dispute about whether psychiatrist's actions constituted deliberately indifferent medical care); *Madrid* v. *Gomez*, 889 F.Supp. 1146, 1159 (N.D. Cal. 1995) (noting that it is proper to rely on expert testimony "in assessing subsidiary issues which inform the court's final determination" on whether effects of solitary confinement in segregated housing unit pose a substantial risk of serious harm to inmates). Only the Court of Appeals of the District of Columbia appears to share the S.J.C.'s view that "[t]he *Rhodes*

court flatly discounted expert opinion." *Inmates of Occoquan* v. *Barry*, 844 F.2d 828, 836 (D.C. Cir. 1988).[8]

II. THE QUESTION PRESENTED HAS NATIONAL IMPORTANCE.

At least thirty states and the U.S. Bureau of Prisons have recently constructed supermax prisons or control units similar to the DDU, and more will be built in the future.[9] These

---

[8] *But see Inmates of Occoquan* v. *Barry*, 850 F.2d 796, 798 (D.C. Cir. 1988) (denial of rehearing *en banc*) (Wald, C.J., dissenting) ("*Rhodes* endorsed as legitimate the use of expert opinion – not to *establish* constitutional standards of decency, but to summarize professional knowledge and norms, and to guide the ultimate judicial judgment on what constitutes 'elementary decency.' . . . Since *Rhodes*, courts in other circuits have continued to rely on expert opinion to describe actual prison conditions and to evaluate their impact on prisoners' health and safety.") (internal citations omitted; emphasis in original).

[9] The proliferation of supermax units has been well documented by the news media. *See Nightline Special Edition: Crime & Punishment, Part III, Blood In, Blood Out* (ABC television broadcast, Aug. 27, 1998), *available in* Westlaw, database ALLNEWS, 1998 WL 9100174 (Ted Koppel notes that "there is general agreement that this place [a supermax prison unit in Texas] drives men mad;" noting that supermax units "are becoming increasingly popular in this country. We have almost 60 of them spread over 31 states. Five more in the pipeline are expected to be up and running next year."); Lisa Anderson, *Is 'Supermax' Too Much? Strict Isolation of Inmates Called Cruel, Ineffective*, CHI. TRIB., Aug. 2, 1998 at 1 (noting that supermax prisons have "become a trend in state corrections" where the percentage of the total prison population in supermax ranges from 0.5 percent to as high as 20 percent in Mississippi); Peter Annin, *Inside the New Alcatraz*, NEWSWEEK, July 13, 1998 at 35 ("more than 30 states now have supermax pens"); Kate Shatzkin, *Supermax or Super Cruel?*, THE BALTIMORE SUN, May 19, 1996 at 1E (describing Maryland's supermax prison that holds up to 288 prisoners

new prisons are controversial because they are designed to hold prisoners in solitary confinement in conditions of profound social isolation and restricted environmental stimulation for many years.

The impact of long-term confinement under these extreme conditions presents novel and important issues under the Eighth Amendment. Widespread concerns have been voiced in the scholarly and professional literature about the harmful effects of confinement in control units on the mental health and well-being of the prisoners. *See* Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 CAL. W.L. REV. 265, 268 (1977) ("The evidence appears overwhelming that solitary confinement alone, even in the absence of physical brutality or unhygienic conditions, can produce emotional damage, declines in mental functioning and even the most extreme forms of psychopathology, such as depersonalization, hallucination and delusions").[10]

"who spend their days alone in their 65-square-foot cells, with no jobs, classes or programs to fill their time. They eat in their cells and rarely see one another, yelling to communicate through the vent system.").

[10] *See also* Dorte Maria Sestoft et al., *Impact of Solitary Confinement on Hospitalization Among Danish Prisoners in Custody*, 21 INT'L J.L. & PSYCHIATRY 99, 103 (1998) (finding that "[i]f a person remained in [solitary confinement] for 4 weeks the probability of being admitted to the prison hospital for a psychiatric reason was about 20 times as high as for a person remanded in [non-solitary confinement] for the same period of time."); Human Rights Watch, COLD STORAGE: SUPER-MAXIMUM SECURITY CONFINEMENT IN INDIANA 71 (1997) ("Mentally ill people often have difficulty complying with rules, especially in prison setting where the rules are very restrictive, the stresses intense, and there is scant assistance to help the prisoners' [sic] manage their disorders. Those whose psychiatric disorders are reflected in aggressive or disruptive behavior can accumulate long histories of disciplinary infractions that land them in administrative segregation or disciplinary detention. Once con-

The S.J.C.'s decision stands as a barrier to proper judicial consideration of the central issue raised by the nationwide introduction of control units: whether they create a substantial risk of serious harm to the mental health of inmates that violates the Eighth Amendment. The nature and magnitude of the risks presented by the use of control units cannot properly be assessed without the benefit of expert testimony. The S.J.C.'s ruling that expert testimony on the harmful effects of long-term DDU confinement – no matter how powerful the expert testimony may be – cannot justify a trial on the merits appears to be the first decision by any state court of last resort on this critical question. It will surely be invoked by correctional officials throughout the country who seek to avoid scrutiny of their own supermax prisons.[11] This Court

---

fined [in such units] the infractions continue."); Martin Humphreys & Frances Burnett, *Monosymptomatic Hypochondriacal Psychosis and Prolonged Solitary Confinement*, 34 MED. SCI. & L. 343, 345 (1994) (presenting a psychiatric case history of a prisoner who developed unremitting and treatment resistant psychosis following 12 months in solitary confinement; solitary confinement played a significant role in the development of the mental illness); Craig Haney, *"Infamous Punishment": The Psychological Consequences of Isolation*, NAT'L PRISON PROJ. J. 3, 5 (Spring 1993); Jeff Mitchell, M.D., and Christopher Varley, M.D., *Isolation and Restraint in Juvenile Correctional Facilities*, 29 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY, 251, 252 (1990) ("The literature suggests that a variety of mental and behavioral disturbances can be created by isolation for long periods of time"). *Cf.* Adrian Angold, *Seclusion*, 154 BRIT. J. PSYCHIATRY 437, 440 (1989) (noting that "[i]t seems clear that very long periods of seclusion (many days, weeks or months) are unacceptable . . ., and some work on the effects of long-term solitary confinement in prison serves to underline the possible psychopathological harmfulness of such treatment.") (internal citation omitted).

[11] *See* Andrea Estes, *SJC rules solitary cells not cruel*, BOSTON HERALD, June 6, 1998, at 6 (quoting Commissioner of Correction Mi-

should not allow the use of control units to proliferate without providing for meaningful judicial consideration of Eighth Amendment challenges on the basis of fully developed factual records illuminated by expert testimony.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

JOHN REINSTEIN
American Civil Liberties
Union of Massachusetts
99 Chauncy Street
Boston, MA 02111
(617) 482-3170

SCOTT P. LEWIS
Counsel of Record
LAURIE S. GILL
LORI B. SILVER
PALMER & DODGE LLP
One Beacon Street
Boston, MA 02108
(617) 573-0100

Counsel for Petitioners

September 24, 1998

---

chael T. Maloney saying, "Other states were waiting to see what was going to happen here. They can now point to this case when they deal with challenges in their states").

APPENDIX
TABLE OF CONTENTS

APPENDIX A

Opinion of the Massachusetts Supreme Judicial Court A1

APPENDIX B

Suffolk Superior Court Decision A13

APPENDIX C

Order and Entry of Partial Final Judgment A84

APPENDIX D

Denial of the Motion for Reconsideration A87

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-07633

VICTOR TORRES & others[1] *vs.* COMMISSIONER OF CORRECTION & others.[2]

Suffolk. May 7, 1998. - June 5, 1998.

Present: Abrams, Lynch, Greaney, Fried, Marshall, & Ireland, JJ.

Constitutional Law, Imprisonment, Cruel and unusual punishment. Imprisonment, Enforcement of discipline. *Practice, Civil*, Summary judgment. *Evidence*, Expert opinion. *Due Process of Law*, Prison disciplinary proceedings.

CIVIL ACTION commenced in the Superior Court Department on January 19, 1994.

---

[1] Corey Glover, Mark MacDougall, Michael Leoney, Basil Williams, William Dinkins, William Robinson, Keith Parkinson, Adrian Almeida, Jerrell Bunce, and Charles Chase.

[2] The Deputy Commissioner of Correction; the superintendent of Massachusetts Correctional Institution at Cedar Junction (MCI-Cedar Junction); the director of the department disciplinary unit at MCI-Cedar Junction; a correctional officer at MCI-Cedar Junction; and the Commissioner of Mental Health.

The case was heard by *Peter M. Lauriat*, J., on a motion for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

Scott P. Lewis (*John Reinstein* with him) for the plaintiffs.

Thomas O. Bean, Special Assistant Attorney General, for the defendants.

LYNCH, J. The plaintiffs, prisoners presently or formerly confined in a subunit of the Massachusetts Correctional Institution at Cedar Junction known as the department disciplinary unit (DDU), challenge their conditions of confinement. Their complaint contains thirteen counts alleging various constitutional and statutory violations. A judge in the Superior Court allowed the defendants' motion for summary judgment on eight of the thirteen counts. After a timely appeal we granted the plaintiffs' application for direct appellate review. The plaintiffs assert that the judge erred in finding that (1) the conditions present in the DDU do not offend the Eighth Amendment to the United States Constitution or art. 26 of the Massachusetts Declaration of Rights; (2) the DDU is not an "isolation unit" and thus, not subject to the requirements of G. L. c. 127, § 40; (3) the procedures governing DDU confinement do not deprive inmates of procedural due process rights, as guaranteed by the Fourteenth Amendment to the United States Constitution and art. 26; and (4) the conditions present in the DDU do not violate G. L. c. 127, §§ 32, 39. For the reasons set forth below, we reject the plaintiffs' claims and accordingly, affirm the allowance of summary judgment.

Facts. The judge found the following facts. In April, 1992, the Department of Correction (department) opened the DDU at MCI-Cedar Junction to house inmates who have

committed major disciplinary violations while incarcerated. Inmates who, after a hearing before a department special hearing officer, have been found guilty of committing a violation calling for a major sanction may be sentenced to up to ten years in the DDU.[3] 103 Code Mass. Regs. § 430.25 (3) (d) (1993). The DDU is a modern secure facility which can hold up to 124 male inmates in individual cells. The DDU inmates are allowed five hours of outdoor exercise weekly, weather permitting, and they also are allowed to leave their cells to shower and to shave three times weekly.

At all other times, DDU inmates remain in their cells. Each inmate's cell is approximately seven by twelve feet, and contains a toilet, sink, bed, desk with attached seat, and one window. The cell's steel door also has a window, two slots through which items can be passed, and several small holes to facilitate communication through the door. While there, DDU inmates receive hourly visits from correction officers, and daily visits from the director and captain of the DDU. The correctional program officer also makes rounds two or three times weekly. In addition, medical personnel visit the inmates four times each day, while religious and mental health staff make rounds once each week. Inmates may communicate with any of their visitors through their cell doors or by passing a note through one of the door's slots. Inmates may also speak with each other while in the exercise yard or in their cells. While in their cells, DDU inmates have access to the resources of the prison law library and the other reading material. Finally, inmates who have not committed further disciplinary violations while in DDU may eventually have a radio and television in their cells, make four thirty-

---

[3] These plaintiffs were sentenced to from seventeen months to six and one-half years.

minute telephone calls monthly, and have four one-hour, noncontact visits per month.

1. *Rights under the Eighth Amendment and art. 26.* The plaintiffs first claim that the judge erred in ruling on summary judgment that DDU confinement does not subject inmates to cruel *and* unusual punishment, in violation of the Eighth Amendment, and cruel *or* unusual punishment in violation of art. 26.[4] To succeed on an Eighth Amendment claim, a plaintiff-inmate must demonstrate that (1) a prison's conditions of confinement present "a substantial risk of serious harm"; and (2) prison officials acted with "deliberate indifference" to inmate health or safety. See *Farmer* v. *Brennan*, 511 U.S. 825, 834 (1994); *Helling* v. *McKinney*, 509 U.S. 25, 36 (1993). To survive a motion for summary judgment, a nonmoving plaintiff must "designate 'specific facts showing that there is a genuine issue for trial.'" *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 714 (1991), quoting *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-324 (1986).

In support of their claim that a factual dispute exists the plaintiffs cite the affidavit of Dr. Stuart Grassin, who opined that DDU's conditions of confinement can cause "severe psychiatric harm." The plaintiffs therefore contend that a genuine issue exists as to whether DDU's conditions pose "a substantial risk of serious harm." *Farmer* v. *Brennan, supra* at 834. However, other courts have concluded, and we agree that, whether prison conditions are sufficiently harmful to

---

[4] The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Similarly, art. 26 of the Massachusetts Declaration of Rights provides, in pertinent part: "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

establish an Eighth Amendment violation, is a purely legal determination for the court to make. See *Hickey* v. *Reeder*, 12 F.3d 754, 756 (8th Cir. 1993), citing *Hudson* v. *McMillian*, 503 U.S. 1, 6 (1992); *Madrid* v. *Gomez*, 889 F. Supp. 1146, 1246 (N.D. Cal. 1995). Therefore, expert opinion regarding what constitutes cruel and unusual punishment is entitled to little weight. *Rhodes* v. *Chapman*, 452 U.S. 337, 348 n.13 (1981) (expert opinions "may be helpful and relevant with respect to some questions, but 'they simply do not establish the constitutional minima'").[5] Here, there is no factual dispute over the conditions endured by DDU inmates. Rather, the only arguable dispute concerned the extent to which these conditions generally caused inmates' psychological problems. In these circumstances the judge properly concluded that no genuine issue of material fact existed. See *Curtis* v. *School Comm. of Falmouth*, 420 Mass. 749, 754 (1995), cert. denied, 516 U.S. 1067 (1996) (deeming summary judgment proper where the "issues before the judge were issues of law, i.e., whether the condom-availability program, the provisions of which are not in dispute, infringes on the rights of the plaintiffs").

Absent a factual dispute, the judge properly allowed the defendants' motion for summary judgment. As the United States Court of Appeals for the First Circuit has observed, "federal appellate decisions during the past decade which have focused on the factor of segregated confinement and

---

[5] At least one Federal District Court, however, has noted that, while "the opinions of experts are entitled to little weight in determining whether a condition is 'cruel and unusual punishment' under the Eighth Amendment . . . expert opinion may be properly considered in assessing the effects of challenged conditions or practices." *Madrid* v. *Gomez*, 889 F. Supp. 1146, 1159 (N.D. Cal. 1995), citing *Helling* v. *McKinney*, 509 U.S. 25, 36 (1993).

lack of inmate contact reveals to us a widely shared disinclination to declare even very lengthy periods of segregated confinement beyond the pale of minimally civilized conduct on the part of prison authorities." *Jackson* v. *Meachum*, 699 F.2d 578, 583 (1st Cir. 1983). See *Santana* v. *Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983), cert. denied, 466 U.S. 974 (1984) ("courts that have examined the confinement of adults in prison isolation cells have been reluctant to find them unconstitutional, based either on the length of confinement or on the possibility that isolation might cause psychiatric deterioration"). Similarly, in *Libby* v. *Commissioner of Correction*, 385 Mass. 421, 431 (1982), we held that a prison isolation unit whose conditions were more restrictive than those in DDU did not offend the Eighth Amendment because its inmates were provided adequate food, clothing, sanitation, medical care, and communication with others. *Id.* at 431-432.[6] "The 'isolation' and 'loneliness' of which the plaintiffs complain," we concluded, "is not in and of itself unconstitutional." *Id.* at 432. If conditions of confinement harsher than those posed by DDU did not offend the Eighth Amendment, it follows that DDU's confinement is likewise constitutional. Consequently, the judge acted properly in allowing the defendants' motion for summary judgment.[7]

---

[6] For example, inmates there had no opportunity for exercise, and were allowed to leave their cells to bathe only twice weekly. Moreover, they were allowed no reading material other than a Bible and personal legal papers. There was likewise no evidence that the inmates could have radios or televisions in their cells. Finally, aside from prison and medical staff, only attorneys and chaplains could visit the inmates. See *Libby* v. *Commissioner of Correction*, 385 Mass. 421, 424-426 (1982).

[7] We do not reach the plaintiffs' claim that there was a factual dispute with respect to the defendants' "deliberate indifference" (i.e., the second requirement of an Eighth Amendment claim). The plaintiffs must meet

For identical reasons, we reject the plaintiffs' contention that summary judgment was improperly granted to the defendants on the art. 26 claim. While the rights guaranteed under art. 26 "are at least equally as broad as those guaranteed under the Eighth Amendment," *Michaud* v. *Sheriff of Essex County*, 390 Mass. 523, 534 (1983), a prisoner seeking relief under this provision of the Massachusetts Constitution must point to *both* (1) a condition or situation "which poses a substantial risk of serious harm"; *and* (2) facts establishing that a prison official "has knowledge of the situation and ignores it." *Good* v. *Commissioner of Correction*, 417 Mass. 329, 336 (1994). See *'Abdullah* v. *Secretary of Pub. Safety*, 42 Mass. App. Ct. 387, 395 (1997). As previously discussed, the plaintiffs failed to establish a genuine issue of material fact with respect to the first requirement. The evidence instead described conditions of confinement more favorable to inmates than those of an isolation unit we have previously deemed adequate under art. 26. *Libby* v. *Commissioner of Correction, supra* at 435. Consequently, the judge properly allowed the defendants' motion for summary judgment on this claim.[8]

---

both the first and second requirements to have an Eighth Amendment claim. Thus, the plaintiffs' failure with respect to the first requirement precludes the need for trial with respect to the second requirement.

[8] The defendants do not raise the claim of issue preclusion and we express no opinion as to its applicability to this appeal. We note, however, that in Commonwealth *vs.* James Clark, Norfolk Superior Court No. 97-4079 (April 6, 1998), several inmates claimed, inter alia, that incarceration in DDU violates the Eighth Amendment and art. 26. After making extensive factual findings regarding the conditions of confinement in DDU, a Superior Court judge concluded that DDU's conditions offend neither the Eighth Amendment nor art. 26. *Fidler* v. *E.M. Parker Co.*, 394 Mass. 534, 537 (1985).

2. *General Laws c. 127, § 40.* The plaintiffs' complaint alleged that DDU's conditions of confinement violated G. L. c. 127, § 40, which limits confinement in an "isolation unit" to fifteen consecutive days.[9] In allowing the defendants' motion for summary judgment, the judge concluded that DDU is not an "isolation unit" and therefore, is exempt from the fifteen-day limit imposed by § 40. The plaintiffs claim this was erroneous.

Enacted in 1955, § 40 sought to "substitute more humane treatment for the harsher conditions of solitary confinement previously imposed, which were 'deplored' as 'barbaric.'" See *Attorney Gen.* v. *Sheriff of Worcester County*, 382 Mass. 57, 61 (1980), citing Report and Recommendations of the Governor's Committee to Study the Massachusetts Correctional System, 1955 Senate Doc. No. 750, at 43; McGrath, Criminal Law, Procedure, and Administration, 1955 Ann. Survey Mass. Law 119, 126-127. These "harsher conditions," as the motion judge expressly found, included twenty-four hour solitary confinement without communication, exercise, reading material (other than a religious book), medical visits, showers, telephone calls, television, or radio. See *O'Malley* v. *Sheriff of Worcester County*, 415 Mass. 132, 139 (1993) ("Isolation . . . involves a significant loss of freedom, opportunity for exercise or earning good time credits, as well as contact with visitors and others"); *Libby* v. *Com-*

---

[9] General Laws c. 127, Sect. 40, provides, in its entirety:

"For the enforcement of discipline, an inmate in any correctional institution of the commonwealth may, at the discretion of its superintendent, be confined, for a period not to exceed fifteen days for any one offence, to an isolation unit.

"Such isolation units must provide light, ventilation and adequate sanitary facilities, may contain a minimum of furniture, and shall provide at least one full meal daily."

missioner of Correction, 385 Mass. 421, 432-433 (1982) (presupposing that § 40 was applicable to segregated unit in which inmates had no exercise time, no reading material other than Bible and legal papers, and no nonstaff visitors other than attorneys and chaplains).

The judge's findings and the parties' stipulation demonstrate that DDU confinement, while uncomfortable, is a far cry from the "barbaric" conditions § 40 sought to alleviate. Cell construction, access to prison officials and other prisoners, exercise, and entertainment opportunities, to name a few, demonstrate much less severe conditions of confinement than the isolation confinement regulated by § 40. Other courts have reached the same conclusion. See *McGuinness* v. *DuBois*, 891 F. Supp. 25, 29 (D. Mass. 1995), aff'd, 88 F.3d 1146 (1st Cir. 1996); *Abrazinski* v. *DuBois*, 876 F. Supp. 313, 319 (D. Mass. 1995). Accordingly, the judge's allowance of the defendants' motion for summary judgment on this count was proper.[10]

3. *Due process.* The plaintiffs next contend that the judge erred in ruling on summary judgment that the administrative disciplinary process governing DDU confinement does not violate the plaintiffs' procedural due process rights under the Federal and Massachusetts Constitutions. We disagree.

Prison inmates have the protections of procedural due process only if there is an existing liberty or property interest at stake. *O'Malley* v. *Sheriff of Worcester County, supra* at 135, citing *Regents of State Colleges* v. *Roth*, 408 U.S. 564, 571 (1972). In *Sandin* v. *Conner*, 515 U.S. 472, 484 (1995),

---

[10] We note also that the department's own regulations interpreting G. L. c. 127, § 40, differentiate between "isolation" and a "[s]entence to a [DDU]." See 103 Code Mass. Regs. § 430.25 (3) (1995). To that interpretation we give "substantial deference." *Gately's Case*, 415 Mass. 397, 399 (1993).

the United States Supreme Court held that "these interests will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Whether a particular restraint imposes an "atypical and significant hardship" depends, in turn, on its "duration and degree." *Id.* at 486. Where such an interest is deemed to exist, we next ask whether the disciplinary procedures afforded to inmates are adequate to satisfy the due process requirements mandated by the United States Supreme Court. *Nelson* v. *Commissioner of Correction*, 390 Mass. 379, 389 (1983), citing *Wolff* v. *McDonnell*, 418 U.S. 539, 557-558 (1974). In these circumstances disciplinary procedures must include "(1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and to present evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action." *O'Malley* v. *Sheriff of Worcester County, supra* at 138, quoting *Superintendent, Mass. Correctional Inst. at Walpole* v. *Hill*, 472 U.S. 445, 454 (1985), citing *Wolff* v. *McDonnell, supra* at 563-567.

Applying this analysis to the present case, we conclude that, even if there has been an "atypical and significant hardship" the plaintiffs' due process rights have not been violated. Cf. *Sandin* v. *Conner, supra* at 484; *Dominique* v. *Weld*, 73 F.3d 1156, 1160-1161 (1st Cir. 1996). An inmate facing a DDU disciplinary hearing must receive both a disciplinary report and notice of the hearing at least twenty-four hours in advance. See 103 Code Mass. Regs. § 430.11 (2) (1993); *Wolff* v. *McDonnell, supra* at 564 (deeming twenty-four hours notice of disciplinary hearing sufficient). Moreover, an inmate may call witnesses and offer other evidence

at the DDU hearing in his defense, 103 Code Mass. Regs. § 430.14 (4), doing so either himself or with the assistance of counsel, 103 Code Mass. Regs. § 430.12 (1). Finally, after the hearing, the department is required to prepare a written decision, which must include a description of the evidence relied on, a statement of the reasons for the sanctions imposed, and an explanation for the exclusion of any evidence or witnesses. 103 Code Mass. Regs. § 430.17 (1) (a)-(c). With these procedural safeguards in place, DDU's disciplinary process comports with the requirements of the Fourteenth Amendment, as set forth in *Wolff* v. *McDonnell, supra* at 563-567. Accordingly, the judge's allowance of summary judgment was proper.[11]

4. *General Laws c. 127, § 32.* Finally, the plaintiffs request that we reverse the judge's ruling on summary judgment that DDU's conditions of confinement do not violate G. L. c. 127, § 32. We decline to do so.

General Laws c. 127, § 32, requires prison officials to "treat the prisoners with the kindness which their obedience, industry and good conduct merit." This requirement, however, extends only to those inmates "who are not being disciplined." Inmates are sentenced to DDU only after committing a "major" disciplinary offense in a prison facility. See 103 Code Mass. Regs. § 430.25 (3). Cf. 103 Code Mass. Regs. § 421.09 (providing that "[a]n inmate may be placed or retained in a [departmental segregation unit] only for administrative, and not for disciplinary, reasons"). See also *Commonwealth* v. *Forte*, 423 Mass. 672, 673, 677 (1996)

---

[11] For similar reasons, we likewise reject the plaintiffs' claim that DDU's disciplinary process violates inmates' due process rights as guaranteed by art. 12 of the Declaration of Rights of the Massachusetts Constitution. The procedures governing DDU confinement previously described are adequate to protect inmates' art. 12 rights.

(confinement in DDU part of major prison discipline in Massachusetts). Considered in this light, G. L. c. 127, § 32, does not apply to confinement in DDU. The judge, therefore, was correct in allowing the defendants' motion for summary judgment.[12]

Judgment affirmed.

---

[12] We likewise reject the plaintiffs' contention that the judge erred in allowing the defendants' summary judgment motion regarding the plaintiffs' claim under G. L. c. 127, § 39. Section 39 provides, in relevant part, that prisons' segregated units "shall provide regular meals, fully furnished cells, limited recreational facilities, rights of visitation and communication by those properly authorized, and such other privileges as may be established by the commissioner." Specifically, the plaintiffs claim that the judge's allowance of the motion was "an apparent clerical error," given the judge's notation that "[n]either plaintiffs nor defendants have addressed the allegation in Count V that the [department] defendants have violated G. L. c. 127, § 39." However, the record indicates that the defendants did address this issue in their motion for summary judgment. Moreover, undisputed facts in the summary judgment record indicate that DDU has met § 39's requirements. Each inmate receives three meals daily, while residing in a cell equipped with a toilet, sink, bed and desk with attached seat. Moreover, DDU inmates have access to an exercise facility for five hours weekly. They also may communicate with both prison staff and each other throughout the week.

APPENDIX B

REDACTED

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 94-0270-E

VICTOR TORRES, COREY GLOVER, MARK MACDOUGALL, MICHAEL LEONEY, BASIL WILLIAMS, WILLIAM DINKINS, WILLIAM ROBINSON, KEITH PARKINSON, ADRIAN ALMEIDA, JERELL BUNCE and CHARLES CHASE

vs.

LARRY DUBOIS, MICHAEL MALONEY, RONALD DUVAL, PHILLIP L. HARRINGTON, JR., EDWIN DOOLIN, AND EILEEN ELIAS[1]

---

[1] Defendants DuBois, Maloney, Duval, and Harrington who serve respectively as Commissioner of the Massachusetts Department of Correction, Deputy Commissioner of the Department of Correction, Superintendent of MCI - Cedar Junction, and Director of the Department Disciplinary Unit at Cedar Junction have been named in their individual and official capacities. Defendant Doolin, formerly second-in-command at the DDU, has been named in his individual capacity only. Defendant Silva, second-in-command at the DDU, has been named in his official capacity and has replaced Doolin. Defendant Elias, formerly Commissioner of the Massachusetts Department of Mental Health, has been named in her individual capacity only. Defendant Sudders, Commissioner of the Massachusetts Department of Mental Health, has been named in her official capacity and has replaced Elias.

MEMORANDUM OF DECISION AND ORDER ON (1) PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT IV, AND (2) DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS

The plaintiffs, inmates who were or are currently housed in the Department Disciplinary Unit ("DDU") at the Massachusetts Correctional Institution at Cedar Junction ("Cedar Junction"), brought this class action in January, 1994, on their own behalf and on behalf of all inmates who are or may in the future be confined in the DDU. The defendants are officials of the Department of Correction ("DOC") and of the Department of Mental Health ("DMH"). The plaintiffs have challenged the allegedly "unlawful and inhumane conditions" of their confinement at the DDU, and have asserted that the defendants have violated plaintiffs' constitutional and statutory rights.

The plaintiffs were sentenced to prison after being convicted of first degree murder, second degree murder, aggravated rape, and armed robbery. Each plaintiff was assigned to the DDU after being found guilty of committing a major disciplinary violation while incarcerated. These violations include: stabbing another inmate, kicking and headbutting a correction officer; destroying a cell and throwing coffee at a correction officer; punching an officer in the face; and fighting with an inmate and biting an officer who responded to the fight. Some of the plaintiffs were found guilty of committing major disciplinary violations while incarcerated in the DDU. One was found guilty of breaking out of an exercise yard and attempting to attack another inmate; another, of biting a correction officer and spitting at a doctor in the

DDU; and still another, of throwing urine at a correction officer.

Plaintiffs challenge the alleged lack of due process in the disciplinary proceedings that led to their commitment to the DDU, and the policies, procedures, and confinement practices that result in allegedly unlawful and inhumane conditions of plaintiffs' DDU confinement. (Amended Complaint, par. 1). The plaintiffs' action is a systemic challenge to the operation of the DDU rather than to requests for relief based on assertions of individual plaintiffs. The systemic nature of their challenge is evident from the Amended Complaint and the relief sought.

Plaintiffs contend that defendants inappropriately assert that evidence regarding individual prisoners' experiences in the DDU is not relevant on the declaratory judgment counts and does not raise material issues of disputed facts. (Defendants' Brief, 10). Plaintiffs contend that individual prisoners' experiences provide evidence of actual conditions in the DDU. Hence, they claim that information pertaining to the nature and effect of DDU confinement on individual inmates is relevant and presents issues of material fact which precludes summary judgment on their declaratory judgment claims.[2]

---

[2] By stipulation, defendants may agree to accept the admissibility of evidence as to persons other than the named plaintiffs when relevant to prove the existence of the alleged unlawful practices or procedures that the plaintiffs claim had adversely affected them. Williams v. Secretary of the Executive Office of Human Services, 414 Mass. 551, 554 n. 4 (1993) (action brought on behalf of homeless and mentally ill individuals that failed to demonstrate that the practices and policies of the DMH in allocating its resources discriminated against individuals with disabilities in violation of the ADA; the Court determined that DMH defendants were entitled to summary judgment on those claims).

On July 1, 1994, the Superior Court (Flannery, J.) entered a Pre-Trial Case Management Order in this action which provided that it would not proceed as a class action,[3] that pursuant to Mass. R. Civ. P. 42(b), plaintiffs' damage claims would be bifurcated from their declaratory judgment claims, and that this court would resolve plaintiffs' declaratory judgment claims before considering their claims for damages.[4] The Case Management Order specified that after the declaratory judgment stage, "the Court will entertain motions for appropriate enforcement orders, including injunctions, and will schedule a prompt trial on the damage claims." (CMO, p.3).

The plaintiffs have now moved for summary judgment on Count IV of their Amended Complaint against the Commissioner of the Department of Mental Health,[5] and the defendants have moved for summary judgment on all counts. On

---

Further, the Court determined that, "[i]n declaratory actions, even where relief is denied, the rights of the parties must be declared." Id. at 570.

[3] The order states that "a speedy trial on the named plaintiffs' declaratory judgment claims would be a superior method for the fair and efficient adjudication of the controversy and will not prejudice any member of the putative class . . . Notice . . . shall be given to members of the putative class . . ." including all those who were confined to the DDU at the time the action was commenced and those who are currently or will soon be confined to the DDU.

[4] The motions before this court and this memorandum of decision are therefore directed principally at plaintiffs' claims for declaratory and injunctive relief.

[5] Mary Lou Sudders ("Sudders") replaced Eileen Elias ("Elias") as DMH Commissioner after this suit had been filed. Elias was named both individually and in her official capacity. Plaintiffs have not moved for summary judgment against Elias individually.

May 7, 1996, the court, accompanied by counsel for the parties, took an extensive view of the DDU. Thereafter, the parties presented oral arguments on their summary judgment motions.

PROCEDURAL POSTURE OF THIS CASE

In the intervening two and one-half years since the Case Management Order was issued, it appears that many of the named plaintiffs have been released from the DDU, thereby making their claims moot.[6] At the same time, the parties, through their attorneys, have spent substantial time, effort, investigation and research in preparing and presenting the issues in this case to the court. It would be unfair for this court to dismiss or ignore some or all of the claims and issues that have been raised simply because the named plaintiffs are no longer in the DDU.

Accordingly, with respect to any issue which remains open as a result of this decision, the court would urge the parties to stipulate to the facts regarding the allegations made by those inmates no longer in the DDU.[7] Alternatively, the

---

[6] _____ and _____ McCrosson Aff., Ex. 4, par. 7(F).

[7] See, e.g., Williams v. Secretary of the Executive Office of Human Services, 414 Mass. 551, 554 n.4 (1993), where the defendants agreed to the following: (1) to waive defenses based on the statute of limitations through the date of final judgment in the case as to any subsequent plaintiff whose claim for declaratory or injunctive relief is based on the same factual elements which the plaintiffs are required to prove in order to show entitlement to relief, provided that the subsequent claimant's claim was not already barred prior to a certain date; (2) to be bound by the Superior Court's judgment regarding the existence and scope of any statutory, regulatory, common law, or constitutional rights as to any

parties could stipulate that those inmates no longer in the DDU would be permitted to present evidence at trial with respect to their claims, even though they were no longer parties to the action. If the parties are unable or unwilling to so stipulate and agree within ninety days from the date of this decision, the court would order reconsideration of the portion of the Case Management Order which denied class action status to the plaintiffs in this case.

BACKGROUND

Plaintiffs have made claims of unlawful confinement in isolation (Amended Complaint, pars. 32-47), inadequate psychiatric screening, monitoring and treatment (pars. 48-64), inadequate medical treatment (pars. 65-69), systematic use of gassings, beatings and restraints (pars. 70-78), inadequate food (pars. 79-82), denial of access to the courts (pars. 83-87), and unlawful DDU hearings (pars. 83-95). The defendants have denied each and all of these claims.

The summary judgment record[8] presently before the court reveals the following material undisputed facts: Before the

---

subsequent similarly situated claimant; (3) to be bound by any judgment of the Superior Court regarding the legality or illegality of any practice or procedure as to any similarly situated claimant adversely affected by such practice or procedure; (4) not to argue mootness based on the plaintiffs' current situation, so long as there remains a risk that the plaintiffs might be subjected to the challenged practices; and (5) to accept the admissibility of evidence as to persons other than the named plaintiffs when relevant to prove the existence of the alleged unlawful practices or procedures that the plaintiffs claim have adversely affected them.

[8] The summary judgment record includes the Statement of Agreed Facts, affidavits, and excerpts of deposition transcripts submitted by the parties.

DDU opened, DOC inmates who committed major disciplinary violations while incarcerated were assigned to the Department Segregation Unit ("DSU"). DSU inmates were permitted to participate in prison rehabilitation and educational programs. They could also purchase items from the canteen, smoke cigarettes, have a television and radio in their cells, make up to three fifteen minute telephone calls per week, and have a maximum of three contact social visits per week. Nearly fifty percent (50%) of the inmates released from the DSU were returned to it.

Defendant Larry E. DuBois ("DuBois") became Commissioner of the DOC in July, 1991. DuBois, along with defendant Michael Maloney ("Maloney"), Deputy Commissioner of the DOC, and defendant Ronald Duval ("Duval"), Superintendent of Cedar Junction, determined that a more restrictive disciplinary unit was needed to deter disciplinary violations more effectively. They decided to implement a unit akin to the federal "control unit" facility in Marion, Illinois where DuBois had previously worked and where the recidivism rate was quite low.

The DDU opened in April, 1992, to house inmates who had been found guilty of committing major disciplinary violations and to provide a more restrictive environment than that of the DSU. According to the defendants, the DDU has successfully deterred disciplinary violations and has had only an eight percent (8%) recidivism rate.[9]

In order for an inmate to be sent to the DDU, a DOC officer must fill out a disciplinary report alleging a violation. The disciplinary officer at the facility where the inmate is

---

[9] It should be noted, however, that the DDU has only been operating since 1992. It is not clear how many inmates have remained in general population for a significant period of time after being released from the DDU.

housed must then determine that the violation is "major" under 103 Code Mass. Regs. 430.09(4) and is sufficiently serious to refer the matter to a DDU Special Hearing Officer. In 1995, the disciplinary officer at Cedar Junction referred approximately three percent (3%) of the disciplinary violations to the DDU hearing officer. Approximately five percent (5%) of the disciplinary officer referrals were reversed by the Deputy Commissioner, who must agree with the referral before the matter is heard by the Special Hearing Officer.

After a hearing, if the Special Hearing officer finds the inmate guilty of the major disciplinary violation alleged and concludes that the violation warrants a DDU sentence under 103 Code Mass. Regs. 430.09(4), he may sentence the inmate to a maximum of ten years in the DDU. The inmate may then appeal to the Commissioner or his designee. In approximately ten percent (10%) of the inmate appeals, Deputy Commissioner Maloney, who has served as the Commissioner's designee, has either reversed the decision of the Special Hearing officer or shortened the DDU sentence. If Maloney denies the appeal, the inmate may seek redress through an action in the Superior Court in the nature of certiorari pursuant to G.L. c. 249 § 4.

The DDU is a modern secure facility with a capacity to house 124 male inmates in individual cells. It has three wings; each wing has four tiers; and each tier has eleven or twelve cells and one shower.

Each cell is approximately seven feet by twelve feet. Each has a toilet, a sink, a bed, a desk with an attached seat, and a five and one half inch by fifty-seven and one half inch window at the rear of the cell. Each cell is illuminated by two forty-watt four-foot long fluorescent lights. Each cell also has a thirteen-watt nightlight.

The walls of each cell are concrete. There is a small gap between the floor and the base of the cell door. Each cell door is solid steel with a four inch by twenty-six inch window. Each door also has approximately twenty-three one-eighth inch holes located four and a half feet above the floor.[10] Each door also has two slots. The upper slot is used to serve food to and handcuff the inmate. The lower slot provides access to the inmate's ankles so that they may be shackled. Inmates are shackled and handcuffed any time they leave their cells. Because no two cells face each other, inmates in their cells in the DDU cannot see one another.

There are three exercise pens attached to the DDU, each of which contains seven separately fenced exercise areas. Each area is approximately seven feet wide by thirty-five feet long by ten feet high, and is covered with a chain-link fence on the top and on all sides. Recreational equipment is not allowed. According to the defendants, DDU inmates may exercise one hour each day for five days each week. Defendants admit, however, that prior to the Fall of 1995, DDU inmates were deprived of exercise as a form of punishment. The DOC no longer follows this practice, but DDU inmates may be denied exercise for safety or security reasons, including prison lock-downs. There is also evidence that, because there is no area for indoor exercise, DDU inmates do not exercise during inclement weather. Further, the plaintiffs claim that often they are forced to choose between a counseling session and exercise because DDU authorities schedule counseling to conflict with the exercise hour.

The DDU has approximately thirteen multi-purpose rooms, some of which are used for mental health counseling.

---

[10] These holes are apparently designed to facilitate communication through the cell door.

It also has a health services unit. There are four observation cells which have glass front walls and beds with modifications to allow the inmates to be placed in four-point restraints.

Correction officers make rounds on the tiers once every hour. The Director of the DDU, defendant Phillip L. Harrington ("Harrington") , and the Captain of the DDU[11] who is second-in-command, make rounds once each business day. The correctional program officer makes rounds two or three times per week. Nurses or medical assistants generally make rounds four times each day. Mental health and religious staff make rounds once each week. During these rounds, inmates may speak with the officers, medical personnel, or religious staff through their cell doors or by passing a note. Inmates may speak with one another while in the exercise yard. It is possible for the inmates to speak to each other while in their cells, although there is some evidence that communicating in this fashion is quite difficult.

A DDU inmate may not participate in any prison programs or correspondence courses, and he may not have educational materials in his cell. During the first thirty days of a DDU sentence, an inmate may not have a radio or television. He may not make telephone calls or have any visits except with clergy or with his attorney upon the attorney's request. He may keep up to twelve photographs in his cell and have paper and a pen with which to write letters. He may shower and shave three times a week and receive materials to clean his cell once a week. He may borrow books from a general book cart and may keep up to four books plus a religious book in his cell at any one time.

---

[11] It appears from the Amended Complaint that defendant Edwin Doolin ("Doolin") serves as Captain of the DDU.

He may also use a legal book cart which contains approximately thirty-five legal books. There is one such cart for each wing of the DDU. If an inmate would like a photocopy of a case, he may submit a request for the main prison law library to copy it for him. He may also request to use materials from the main prison law library by completing and submitting a request form.

According to the plaintiffs, however, the book cart materials are inadequate and there are lengthy delays in receiving photocopies of cases and requested materials from the main prison law library. Plaintiff _____ claims that he could not pursue an action against the DOC relating to a claim of inadequate health care. According to plaintiff _____ he was unable to pursue challenges to his federal bank robbery conviction because of the lack of federal case-law and materials. Plaintiff _____ asserts that he could not file a complaint arising from an isolation sanction. Plaintiff _____ maintains that because of the inadequacies of the book cart, he was unable to file a responsive pleading in his appeal from an adverse ruling in a civil rights action against DOC. Consequently, his appeal was dismissed.

An inmate in the DDU may receive a DOC-owned radio after thirty days without a disciplinary violation. During the next thirty days, he will be allowed to make one thirty-minute telephone call and have one non-contact visit which generally lasts about one hour. If the DDU inmate has sixty consecutive days without a disciplinary violation, he will be issued a DOC-owned television, be allowed to make two phone calls, and have two visits. After ninety days without a violation, he may make three telephone calls and have three visits. After one hundred and twenty days without a violation, he may make four calls and have four visits. If a DDU

inmate is found guilty of a major disciplinary violation, he loses all privileges and returns to new-man status.

DDU inmates eat alone in their cells and they may not purchase items from the canteen. According to Joanne Gunnard ("Gunnard"), registered dietician and Food Services Director at Cedar Junction since January, 1995, DOC's Director of Food Services, Peter Szafir, sends Gunnard a five-week menu from which she prepares food for inmates and correctional officers at Cedar Junction. Inmates in the DDU receive three meals daily and the same quantity and quality of food as inmates in general population at Cedar Junction. Inmates on "alternate feeding," who are not allowed to have utensils, receive food that can be eaten without utensils.

Food is served in two "temp-tech" trays, one for cold food and the other for hot food. The hot trays are placed on carts which have electrical warming units to maintain the temperature of the food at a minimum of 160 degrees Fahrenheit. The carts are unplugged when the delivery truck is ready to go to the DDU. The carts may be plugged in to an electrical outlet prior to serving the food. At least five times per week, a staff member checks the temperature of the food before it is served. If the temperature is below 145 degrees, the food is sent back to the kitchen to be reheated or replaced.

Mary Joan McLarney ("McLarney"), a registered dietician employed by Canteen Corporation to review institutional menus for various clients including the DOC, analyzed the DOC's fall-winter cycle menu in November, 1995. Based on the Nutritionist IV Diet Analysis and Evaluation Module, the menu, according to McLarney, meets or exceeds the nutrient requirements specified by the Recommended Daily Allowances. The menu affords inmates on average approximately 2900 calories daily which reflects the mean population requirement for males age twenty-five to fifty.

Plaintiff _____ went from 220 pounds to 180 pounds during a five-month DDU confinement and was denied double portions which his doctor had ordered due to _____ HIV positive condition. Since leaving the DDU, _____ has regained the weight that he had lost. Plaintiff _____ asserts that he has been deprived food on three or four occasions as a result of his comments about the quality or quantity of the food. According to plaintiff _____, he lost thirty pounds while in the DDU, was placed on alternate feeding twice when he received a sandwich and juice instead of a regular meal, and he received smaller portions than those he received in general population. Plaintiff _____ claims he went from 215 pounds to 160 pounds while in the DDU, the portions were too small, the meat was undercooked to the point of being inedible, and, despite a doctor's orders to serve him double portions, defendants refused, contending that the food was adequate.

From January 1, 1992, through June 30, 1994, the DOC contracted with Emergency Medical Services Associates, Inc. ("EMSA") to deliver medical and mental health services to inmates. Since July 1, 1994, the DOC has contracted with Correctional Medical Services, Inc. ("CMS") to provide these services. Nurses staff the DDU approximately sixteen hours per day. Physicians periodically examine inmates and see inmates referred by nurses in the health services unit.

Since February, 1994, Cedar Junction has been accredited by the National Commission on Correctional Health Care ("NCCHC"), a national association which oversees and accredits correctional health care systems. The contract between CMS and the DOC requires that the DOC institutions continue to be accredited by NCCHC.

Pursuant to G.L. c. 127, §39, the DOC is to provide periodic examinations of inmates in segregated units under the

supervision of the DMH. In 1991, the DMH agent who had been in charge of such supervision expired and DMH's supervision of inmate health care apparently expired with him. Six inmates' counsel brought G.L. c. 127, §39 to the attention of Dr. M. Annette H. Hanson ("Hanson"), Deputy Commissioner for Clinical and Professional Services for DMH.[12]

In August, 1994, the DMH hired Neurological Associates of Natick, P.C. ("NAN") to review the health care at the segregated units of Cedar Junction, including the DDU. Dr. Benjamin Matzilevich ("Matzilevich") of NAN reviewed the protocols and standards of CMS. Matzilevich also interviewed staff, reviewed randomly selected medical records and interviewed a random selection of inmates. In September, 1994, Matzilevich completed a ten page report which summarized his findings and concluded that quality health care was being provided to the inmates in the segregated units of Cedar Junction. Matzilevich reported, however, that all of the men interviewed complained that mental health services were inadequate and lacked privacy. Further, "[i]ssues related to privacy and confidentiality continually need to be examined and improved. Mental health services provide effective interventions to meet the needs of men who are in acute crisis. However, proactive services offered through mental health clinicians are limited."

---

[12] Hanson assumed this post in January, 1992, but since January, 1996, has been employed by the Division of Medical Assistance. Hanson testified at her deposition that she is the person most knowledgeable about DMH compliance with G.L. c. 127, §39. According to Hanson's affidavit, Elias delegated the responsibility of ensuring DMH compliance with G.L. c. 127, §39 to her some time during the first half of 1994 but Hanson has not informed Elias of the details of her efforts to effect compliance.

In February or March, 1995, Hanson conducted a one-day inspection of the segregated units of Cedar Junction which included the East Wing Segregation Unit, the West Wing Segregation Unit, the Health Services Unit, and the DDU. Hanson did not review any medical files or interview any DDU inmates. However, she reviewed CMS's policies and procedures and discussed DMH's role pursuant to G.L. c. 127, §39 with Kathleen Dennehy, DOC's Deputy Commissioner for Health Services.

According to Hanson, in the future, DMH will visit DDU no more than annually for a one-day inspection during which it will review a random selection of inmate files and meet with inmates and staff. DMH will also follow up with DOC officials at the conclusion of the annual reviews. Hanson has stated, however, that DMH has no understanding of whether it has the authority to direct DOC to correct problems with inmate health care.

DISCUSSION

Summary judgment must be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Community National Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the moving party is entitled to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). With respect to any claim on which the party moving for summary judgment does not have the burden of proof at trial, it may demonstrate the absence of a triable issue either by submitting affirmative evidence that negates an essential element of

the opponent's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); Accord, Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment." Pederson, 404 Mass. at 17. The opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

In ruling on a motion for summary judgment, the court must not consider the "credibility of the witnesses or the weight of the evidence, nor should the [court] make findings of fact." Riley v. Presnell, 409 Mass. 239, 244 (1991), citing Attorney General v. Bailey, 386 Mass. 367, 370 (1982). However, "the movant is held to a stringent standard . . . . [A]ny doubt as to the existence of a genuine issue of material fact will be resolved against the movant." 10A C. Wright, A.R. Miller & M. Kane, Federal Practice and Procedure, §2727, at 125-125 (1983) (construing Fed. R. Civ. P. 56).

I. MOOTNESS

The defendants assert that the equitable claims of plaintiffs _____ should be dismissed as moot because these plaintiffs have been released from the DDU. There is substantial authority holding that a prisoner's claims for declaratory and injunctive relief regarding his conditions of confinement become moot when those conditions change due to a transfer. See e.g. Pidge v. Superinten-

dent, Massachusetts Correctional Institution, Cedar Junction, 32 Mass. App. Ct. 14, 19 (1992). However, given the procedural posture of the case in light of the Case Management Order, as noted infra, the defendants' argument is premature if not inappropriate. At a minimum, the denial of the plaintiffs' initial request to treat this case as a class-action will be reconsidered by the court if the parties are unable to stipulate to the facts or the evidence that would be offered at the trial of this case.[13]

II. PLAINTIFFS' SUMMARY JUDGMENT MOTION

Count IV: DMH violation of G.L. c. 127, §39

General Laws c. 127, §39 provides that "[u]nder the supervision of the department of mental health, all inmates confined to a segregated unit shall be given periodic medical and psychiatric examinations, and shall receive such medical and psychiatric treatment as may be indicated." The plaintiffs assert that they are entitled to summary judgment against the Commissioner of DMH because DMH has failed to supervise the periodic medical and psychiatric examinations and treatment of inmates in segregated units as required by G.L. c. 127, §39. The plaintiffs argue that DMH's recent supervision of inmate health care and the role which DMH plans for the future is inadequate as a matter of law to fulfill

---

[13] For example, the parties could agree that evidence as to persons other than those named plaintiffs still in the DDU would be admissible when relevant to prove the existence of the alleged unlawful practices or procedures that the plaintiffs claim have adversely affected them. Williams v. Secretary of the Executive Office of Human Services, 414 Mass. 551, 554, n.4 (1993).

its duty under G.L. c. 127, §39. Plaintiffs further maintain that DMH's historic neglect of its supervisory role makes injunctive relief appropriate.

There is no dispute that the DDU is a segregated unit to which G.L. c 127, §39 applies, and that the DMH failed to provide the mandated supervision from 1991 until several months after this suit had been filed. Thus, for the first two years of the DDU's operation, the DMH provided no supervision of inmate health care. In Layne v. Superintendent, MCI Cedar Junction, 406 Mass. 156 (1989), the Supreme Judicial Court held that where the defendants had cured a constitutional deprivation while the suit was pending, declaratory and injunctive relief was not appropriate. Id. at 160. The issue, then, is whether the DMH has cured its previous failure to comply with G.L. c. 127, §39. In other words, is the DMH's contemplated review of inmate health care adequate and is the DMH currently providing the mandated "supervision"?

"'Supervision' is the act of one who supervises and to supervise is to oversee, to have oversight of, to superintend the execution of or performance of (a thing), or the movements or work of (a person); to inspect with authority; to inspect and direct the work of others." Fluet v. McCabe, 299 Mass. 173, 179 (1938). As DMH has aptly argued, supervision does not require micro-management. Nor will it prevent or avoid all problems in the delivery of health care services. However, it does require sufficient attention to identify problems and it necessarily confers the authority to address and correct such problems.

Plaintiffs rebut defendants' argument that because G.L. c. 127, § 39 does not define the word "supervise" that the Court must defer to DMH's interpretation. Plaintiffs contend that unless DMH's interpretation of "supervision" rises to the

level of the Supreme Judicial Court's determination of the definition as meaning to "oversee and direct" then DMH's interpretation fails. See Fluet v. McCabe, 299 Mass. 173, 179 (1938).

Plaintiffs argue that DMH cannot determine whether DDU inmates are receiving the necessary psychiatric treatment that may be indicated unless DMH learned the status of inmates' health. DMH conducted a one day inspection of the DDU and did not speak with a single inmate or review any inmate's mental health file. (Hanson, TR1:90, 99-100). Plaintiffs contend that this did not allow DMH to ascertain the mental health status of DDU inmates.

Plaintiffs assert that § 39 was enacted to provide an additional safeguard for segregated inmates' mental health. Since DMH's appraisal of inmates' mental health status is superficial, DMH's conduct fails to satisfy the statute, according to plaintiffs.

The person in charge of DMH's compliance with G.L. 127, §39, M. Annette Hanson, M.D., construed the statute to mean, the kind of overview done by accrediting and licensing agencies in the health care field to determine whether services were being delivered. (Hanson Aff. par. 8 at 4). Hanson did not construe the statute to require DMH to review the medical records of each inmate or to review the clinical decisions made in treating those inmates. (Hanson Aff. par. 8 at 4).

According to Hanson's deposition testimony, she was not aware of whether any changes had been made as a result of Matzilevich's report. Despite Matzilevich's reported problems with mental health care, Hanson did not direct changes in the delivery of such services and did not ensure that such

changes were properly implemented.[14] Clearly, supervision requires more than just evaluation. Unless the DMH exercises its authority to direct changes in health care services when evaluation of those services reveals inadequacies, then the DMH fails to provide the mandated supervision. It is particularly troubling that the reported inadequacy was in the delivery of mental health care, an area which the DMH should be prepared to address, yet, no steps were taken to ensure that changes would be implemented.[15]

On September 12, 1986, DMH entered into a stipulation of dismissal in Alston v. Fair, D. Mass., Civil No. 77-3519-G. The stipulation provided that "DMH [would] comply with the provisions of G.L. c. 127, §39 that require DMH to supervise the provision of periodic medical and psychiatric examinations and treatment given to inmates of segregated units, as that term ha[d] earlier been defined by the court." Previously, an Order Concerning the DMH's Supervision of Medical and Psychiatric Care for Inmates in Segregated Units at MCI Walpole had entered which detailed what that supervision would entail. See Appendix A. Among other things, the provisions included a requirement that "[a]t least twice each year the DMH shall inspect MCI Walpole, including records of confinement of inmates in segregated

---

[14] According to the affidavit of Dr. Richard Vinnaco, a CMS psychologist, CMS has taken steps to rectify the problems identified in the NAN report.

[15] Hanson did write a letter to Kathleen Dennehy in which she wrote, "At this time, DMH does not have any recommendations for changes needed in the provision of . . . services. DMH would, however, encourage DOC to review [NAN's] comments about areas in which there might be improvement in the delivery of mental health service, and take actions as it deems appropriate."

units and records of the provision of medical and psychiatric examinations and treatments given to inmates . . . ."

It is clear that even the future plan of the DMH to inspect the DDU annually does not meet the standard of supervision established by Alston. According to Hanson's affidavit, although she was aware that the DMH had developed protocols in response to Alston, she has not seen them and would not follow them because of the significant changes in health care services since the early 1980's, including the retention of CMS, a well-respected provider, the accreditation of Cedar Junction by NCCHC, and the reports of NAN. While these changes may affect the degree of supervision required, they do not relieve DMH of its duty to supervise. Clearly, this duty has previously been ignored or forgotten and even now seems to be a point of confusion as the DMH continues to be uncertain about its authority to effectuate changes in health care services.

Plaintiffs are entitled to summary judgment on Count IV of their Amended Complaint. By failing to provide supervision after NAN's report, DMH has violated its statutory obligation pursuant to c. 127, §39 and, further, has ignored the Alston protocols. It is not the position of this Court that it should micro-manage the system at DMH. The parties should propose a remedy in keeping with the intent of the Legislature pursuant to G.L. c. 127, §39. The DMH shall supervise the provision of periodic medical and psychiatric examinations and treatments to DDU inmates pursuant to the protocols of Alston v. Fair, D. Mass. C.A. No. 77-3519-G. See Appendix A.

Further, the DMH should be notified about transfers of inmates to and from Bridgewater and the DDU. Section 39 requires that, "all inmates confined to a segregated unit shall . . . receive such medical and psychiatric treatment as may be

indicated." DMH cannot be fully aware of the medical and psychiatric treatment that an inmate may require if it is not notified of the need for an inmate to be treated at Bridgewater.

III. DEFENDANTS' SUMMARY JUDGMENT MOTION

Counts I and II: Cruel and Unusual Punishment

The plaintiffs contend that their confinement to and treatment in the DDU constitutes cruel and unusual punishment in violation of the federal and state constitutions and 42 U.S.C. §1983.[16]

Incarceration constitutes cruel and unusual punishment in violation of the Eighth Amendment and Article 26 of the Massachusetts Declaration of Rights when conditions of confinement pose a substantial risk to inmates, and prison authorities are deliberately indifferent to that risk. Dee Farmer v. Edward Brennan,[17] 114 S.Ct. 1970, 1977 (1994); Good v. Commissioner of Correction, 417 Mass. 329, 335-337 (1994).

"The Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amendment, (citation omitted), prohibits the infliction of 'cruel and unusual punishments' on those convicted of crimes." Wilson

---

[16] The plaintiffs' Amended Complaint, while long on factual assertions (pars. 1-95), is remarkably inartful and confusing in describing its legal contentions (Counts I through XIII), and in associating the alleged facts with specific causes of action.

[17] Edward Brennan, Warden, et al.

v. Seiter, 111 S.Ct. 2321 (1991). "Only the 'unnecessary and wanton infliction of pain' implicates the Eighth Amendment. . . ." Id. at 2323, quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 291 (1976).

"Article 26 of the [Massachusetts] Declaration of Rights prohibits the infliction of cruel or unusual punishments. [The Supreme Judicial Court] has read art. 26 to be at least as broad as the Eighth Amendment to the Federal Constitution. (citation omitted). Article 26 bars punishments which are found to be cruel or unusual in light of contemporary standards of decency which mark the progress of society. (citation omitted). In divining contemporary standards of decency, we may look to State statutes and regulations, which reflect the public attitude as to what those standards are. (citation omitted)." Good v. Commissioner of Correction, 417 Mass. 329, 335 (1994).

"An inmate need not wait until he suffers actual harm before he can assert a cause of action under art. 26 . . . . Rather, a claim is made out if there is a substantial risk that the inmate will suffer serious harm as a result of the conditions of his confinement." Good, 417 Mass. at 336.

"Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind . . . ." The Court determined that it remains for the Court to consider what state of mind applies in cases challenging prison conditions. Wilson, 111 S.Ct. at 2326. The offending conduct must be "wanton". Where prison officials are acting in response to a prison disturbance, then wantonness consists of acting "'maliciously and sadistically for the very purpose of causing harm.'" Wilson, 111 S.Ct. at 2326. "[A]ssuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim, . . . (citation omitted) whether

it can be characterized as 'wanton' depends upon the constraints facing the official." Wilson, 111 S.Ct. at 2326.

In Counts II and V of their Amended Complaint plaintiffs claim violations of Article 26 of the Massachusetts Declaration of Rights and of G.L. c. 127, §§32 and 39, grounded in the alleged lack of medical care and adequate food in the DDU.

A. Medical Treatment

"[T]he medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, . . . and the protection he is afforded against other inmates. There is no indication that . . . the actions of prison officials with respect to these non-medical conditions are taken under materially different constraints than their actions with respect to medical conditions. . . ." Wilson, 111 S.Ct. at 2326, 2327. "[I]t is appropriate to apply the 'deliberate indifference' standard articulated in Estelle.'" Wilson, 111 S.Ct. at 2326, 2327. "'It is only such indifference' that can violate the Eighth Amendment, (citation omitted) (emphasis added); allegations of 'inadvertent failure to provide adequate medical care,' . . . simply fail to establish the requisite culpable state of mind." Wilson, 111 S.Ct. at 2323. "'[T]he State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities.'" Wilson, 111 S.Ct. at 2326, quoting Whitley v. Albers, 475 U.S. 312, 320 (1986).

"An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." Estelle v. Gamble, 429 U.S. 97, 103 (1976). "[D]eliberate indifference to serious medical needs of pris-

oners constitutes the 'unnecessary and wanton infliction of pain,' (citation omitted) . . . proscribed by the Eighth Amendment in their response to the prisoner's needs or by prison guards . . . intentionally interfering with the treatment once prescribed." Estelle, 429 U.S. at 104, 105. "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency', in violation of the Eighth Amendment." Estelle, 429 U.S. at 106.

DDU Director Phillip Harrington has received few complaints from inmates alleging that they are not receiving adequate medical treatment. When an inmate has complained, Harrington has advised Correctional Medical Services of the inmate's complaint. Harrington believes that inmates are receiving adequate medical treatment. (Harrington Aff. pars. 25, 27, 28 March 1996).

In March 1996, plaintiff _____ began experiencing extreme discomfort in one of his eyes as if something was stuck in the eye. He made numerous requests to corrections officers to be seen by a member of the medical staff, including verbal requests and letters to Director Harrington, Superintendent Duval, the DDU doctor and Health Services Unit Administrator Sandy Diskin. About a week after he had reported the problem, _____ was told by a C.O. that if he continued to complain about the lack of medical treatment he was receiving for the problem that he would be given a disciplinary report. _____ continued to ask to be seen by a doctor, since the eye condition was painful. He received a disciplinary report which alleged that he had verbally abused a nurse, which was not true. (_____ Aff. par. 4 at 2).

_____ broke his hand in January 1995. Prison officials did not provide treatment, medication or other medical attention form more than three hours after he broke his hand. (_____ Answers to Defendants' First Set of Interrogatories, Response to Interrogatory No. 4).

_____ states that in 1993 he complained about extreme stomach pain for approximately eight days. He told the DDU nurse and a number of the night nurses about his stomach discomfort. Every time _____ asked to see the doctor, he was told that there was a two to three week waiting list. When he finally saw a doctor he was sent the next day to the hospital where he remained for approximately seven days. (_____ Answers to Defendants' First Set of Interrogatories, General Objections at 20).

Summary judgment must be allowed without prejudice to plaintiffs since the facts do not sustain a claim indicating that a systemic problem of inadequate medical treatment exists for inmates. This determination does not preclude plaintiffs asserting individual claims for injury suffered as a result of inadequate medical treatment.

B. Inadequate Food

"Because depriving a prisoner of adequate food is a form of corporal punishment, the eighth amendment imposes limits on prison officials' power to so deprive a prisoner." Cooper v. Sheriff, Lubbock County, Tex., 929 F.2d 1078 (5th Cir. 1991). "[S]edentary men on the average need 2000 calories or more to maintain continued health." Landman v. Royster, 333 F.Supp. 621, 647 (1971) (imposition of bread and water diet designed to break a man's spirit to the end that his powers of resistance diminish, is inconsistent with current minimum standards of respect for human dignity, and is

a violation of the Eight Amendment), "[P]rison authorities enjoy complete control over all sources of pleasure, comfort, and basic needs. Moreover, the pains of hunger constitute a dull, prolonged sort of corporal punishment. That marked physical effects ensue is evident from the numerous instances of substantial weight loss during solitary confinement." Landman, 333 F.Supp. at 647.

The DOC defendants rely on the food services staff of the DOC to provide nutritionally and calorically adequate food to DDU inmates. The food services unit at Cedar Junction designs the menus and prepares the food for DDU inmates. The DOC determines that the meals meet recommended daily nutritional allowances prescribed by the federal government, and contain approximately 2900 calories, on the average.

In February 1996, there were seventy-eight inmates who had been housed in the DDU for more than six months. Of these, fifty-three files contained both the inmates' weights upon arrival in the DDU and their weights on a later date. By comparison, forty of the fifty-three inmates weighed within 10% of their initial body weight; five had gained more than 10% of their initial weight; and eight had lost 10% or more of their body weight. Out of the eight who had lost more than 10%, two had lost more than 20% of their body weight upon arrival. The first of these two inmates was five feet, nine inches tall, and weighed 297 pounds upon entry into the DDU. The second inmate was five feet, eleven inches tall, and weighed 279 pounds upon entry. (McCrosson Affidavit, par. 8 at 4, 5 (March 18, 1996).

Plaintiff _____ contends that on approximately three or four occasions, he was deprived of food after expressing concern about the quality or quantity of the food. On those occasions, the food was being delivered by a cor-

rections officer who refused to give the meal to _____ after _____ statements. (_____ Aff. par. 5 at 2, 3).

Plaintiff _____") lost approximately thirty pounds while he was in the DDU. He alleges that the food portions were smaller than those he received when he was in with the general population. He asserts that he was put on "alternate feeding" twice for a week at a time and was given a sandwich and juice rather than a regular meal during those weeks. _____ alleges he saw correctional officers spit on a food tray before they delivered it. (_____ Affidavit, par. 13, at p. 3).

Plaintiff _____ contends in an affidavit that he lost forty pounds in approximately five months while confined to the DDU. This was cause for concern since _____ is HIV positive and physicians have informed him that it is important for him to maintain his strength. (_____ Affidavit, par. 3, at 1).[18] Further, _____ was under doctor's order to receive double-portions of food when he entered the DDU in _____. After an infraction in _____ he obtained a temporary restraining order and was removed from the DDU. He was placed in a segregation unit at that time. When he returned to the DDU in _____, he was told by a nurse that he would no longer receive double-portions of food. When _____ was seen by a physician several months later, the doctor confirmed the nurse's assertion. The physician told _____ he would not receive double-portions of food until his weight deteriorated. _____ weighed 180 pounds when he left the DDU in _____. Since then _____ has gained

---

[18] Bean Affidavit, Ex. 8, at 29, 82-86. See n. 9, supra.

approximately 34 pounds and weighed 214 pounds as of _____.

(_____ Affidavit, pars. 4, 5, 6 and 7 at 2).

Plaintiff _____) complained of weight loss for lack of food because the portions were allegedly too small or the meat undercooked to the extent of being inedible. (Affidavit, pars. 2, 3 at p. 1). A physician at the Shattuck Hospital instructed _____ to get double-portions of food because of a concern about _____ weight loss. _____ complained to Director Harrington, Commissioner DuBois, Superintendent Duval and Captain Doolin about the food in the DDU and defendants refused to allow plaintiff to receive double-portions of food. (_____ Affidavit, pars. 3, 5, 6 at p. 1, 2).

Summary judgment on the inadequate food claim must be denied, since there are genuine issues of material facts. Plaintiffs assert that most of the inmates have lost substantial weight during their stay in the DDU. Defendants dispute this allegation. A trial is necessary to determine whether defendants were deliberately indifferent to plaintiffs' dietary needs, especially since physicians proscribed that adequate amounts of food be provided for plaintiffs _____ for medical reasons.

C. Excessive Force

Although the plaintiffs have not asserted a specific legal claim in their Amended Complaint concerning the defendants' alleged unlawful use of excessive force, they have raised factual allegations of the unconstitutional use of excessive force (Amended Complaint, pars. 70-78).

"[T]he Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in

penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases . . . where the deliberate use of force is challenged as excessive and unjustified." Whitley v. Albers 475 U.S. 312, 327 (1986).

"'Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' [internal citation omitted]. That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline. It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice. Accordingly, in ruling on a motion for a directed verdict . . . courts must determine whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives. Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain under the standard . . . described, the case should not go to the jury." Whitley v. Albers, 475 U.S. 312, 322 (1986).

"[O]fficials confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force. Despite the weight of these competing concerns, corrections officials must make their decisions 'in haste, under pressure, and frequently without the luxury of a second chance'," [internal citation omitted] . . . .

[A]pplication of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, 'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Hudson v. McMillian, 503 U.S. 1, 6 (1992). "[W]henever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson, 503 U.S. at 7.

"[C]ourts considering a prisoner's claim must ask both if 'the officials act[ed] with a sufficiently culpable state of mind' and if the alleged wrongdoing was objectively 'harmful enough' to establish a constitutional violation." Hudson, 503 U.S. at 8. Thus the subjective aspect of an Eighth Amendment claim can be distinguished from the objective facet of the same claim. Hudson, 503 U.S. at 8.

Under Whitley v. Albers, 475 U.S. 312 (1986), the extent of injury suffered by an inmate is one factor that may suggest whether the use of force was wanton and unnecessary. Hudson, 503 U.S. at 7. "The absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it." Hudson, 503 U.S. at 7. "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. (citation omitted). This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman,

inflicting less than some arbitrary quantity of injury." Hudson, 503 U.S. at 9.

The scope of supervisory liability in the context of a constitutional claim of excessive use of force requires plaintiffs to demonstrate (a) a constitutional violation arising from a subordinate's use of excessive force, (b) deliberate indifference by the supervisor, and (c) an affirmative connection between the supervisor's conduct and the subordinate's unlawful act. Maldonado-Denis v. Catillo-Rodriguez, 23 F.3d 576, 582 (1st Cir. 1994). To defeat summary judgment, plaintiffs must establish by means of "material of evidentiary quality," the requisite affirmative link between a supervisor and the wrongful conduct of his subordinates. Maldonado-Denis, 23 F.3d at 581-585.

In the present case, _____ received threats by a Corrections Officer that he would be physically harmed during unjustified cell extractions if _____ wrote letters to the courts complaining about such cell extractions. The C.O. stated "you can rat to the courts all you want, but I can gas you. Watch your back --- you'll get yours." _____ has been subjected to cell extractions in which he was beaten and gassed as a consequence of making complaints. (_____ Aff. pars. 2, 3 at 1, 2).

Although plaintiff _____ does not recall the dates on which he witnessed the use of excessive force, he did observe _____ being gassed and beaten during a cell extraction. Additionally _____ heard a C.O. throw a prisoner on the ground in one of the DDU yards and heard the prisoner being kicked and punched. (_____ Answers to Defendants' First Set of Interrogatories, Response to Interrogatory No. 6 at 8).

_____ was subjected to a forcible cell extraction for refusing to return a disposable styrofoam tray to the cor-

rectional staff. He claims that staff had left him unclothed in his cell and he refused to return his tray so that he could talk with the Captain. A "move team", consisting of five correction officers in riot gear, appeared at _____ cell door. They opened the food slot and sprayed a chemical into _____ cell. The team returned forty-five minutes later with a dog. The team allegedly ignored _____ attempts to give up and allow himself to be cuffed. _____ cell was sprayed with gas, which hit him in the face. The team attempted to enter the cell, which allegedly jammed. Once in the cell the team punched and kicked _____ and the dog bit his foot. This continued after _____ was handcuffed. _____ was chained to a cement slab and left overnight in an observation cell that was freezing. He was given a blanket by the nurse at 4 a.m., that was taken away before the next shift. _____ eye continued to bleed and the dog bite was left untreated.[19] _____ stated in answer to interrogatories that Kenneth Ayala and Richard Holden were involved in the excessive use of force, along with other individuals that _____ cannot identify. (_____ Answers to Defendants' First Set of Interrogatories, Response to Interrogatory No. 6 at 7).

In response to interrogatories, plaintiff _____ believes that excessive force was used during a cell extraction in April 1994 when inmate _____ was gassed, beaten, forcibly removed from his cell, and placed in four point restraint for several days. This may have been as a result of Leonardi not returning his food tray when requested to do so because he was not served a full meal with the rest of his tier.

---

[19] The cell extraction, as described by _____ in his affidavit, seems to pass Constitutional muster. Complaints against individual prison guards may be addressed in a different cause of action.

(_____ Answers to Defendants' First Set of Interrogatories, Response to Interrogatory No. 6 at 7).

DOC Commissioner Larry DuBois contends that the DOC takes numerous steps to ensure that excessive force is not used against inmates at the DDU. He contends that Deputy Commissioner Maloney advised him that during the almost four years the DDU has been operating, only three inmates out of the more than four hundred who have been housed in the DDU have complained to the DOC alleging that they had been assaulted by staff. The complaints were investigated and were not found to have merit. (DuBois Aff. pars. 19, 20 at 7, 8 March 14, 1996). Nancy White, General Counsel for DOC, advised DuBois that six present or former DDU inmates have filed lawsuits alleging that correctional officials used excessive force against them while in the DDU. Only one officer in the DDU has been disciplined for using excessive force against an inmate. DuBois does not believe that excessive force is used against inmates housed in the DDU. (DuBois Aff. pars. 21, 22, 23 at 8, 9 March 14, 1996).

In answers to interrogatories, four of the eleven plaintiffs did not identify excessive force having been used against them while in the DDU. (Bean Aff. Ex. 8, _____ at 94-96, _____ at 107-109, _____ at 115-117, and _____ at 123-125). However, three out of those four plaintiffs contend that they did witness excessive force being used against other inmates. (Bean Aff. Ex. 8, _____ at 96, _____ at 108, 109, and at 124).

Summary judgment on the claim of excessive force is allowed, without prejudice. The facts do not indicate widespread use of excessive force rising to the level of violations on a systemic basis. However, this order does not preclude plaintiffs asserting individual claims against individual corrections officers for use of excessive force.

Count III: G.L. c. 127 § 40

General Laws c. 127 § 40 provides that "an inmate . . . may . . . be confined, for a period not to exceed fifteen days for any one offense, to an isolation unit." Plaintiffs maintain that DDU is an "isolation unit"[20] and, therefore, that any sentence to the DDU which exceeds fifteen days violates G.L. c. 127 § 40. The question, then, is whether the DDU constitutes an "isolation unit."

This issue has been addressed by several State and Federal courts, all of which have held that DDU is not an isolation unit. See e.g. McGuinness v. DuBois, 891 F.Supp. 25, 27-29 (D. Mass. 1995); Abrazinski v. DuBois, 876 F.Supp. 313, 319 (D. Mass. 1995) and cases cited; MacDougall v. DuBois, 2 Mass.L.Rptr. 294 (1994). Plaintiffs assert that DDU inmates have exhibited signs of mental harm as a result of their DDU confinement and, because the legislature sought to prevent such harm by enacting G.L. c. 127, § 40, the statute should be construed to apply to the DDU.[21] Although well-reasoned, plaintiffs' argument is unavailing.

General Laws c. 127, § 40 "was rewritten in 1955 to substitute more humane treatment for the harsher conditions of solitary confinement previously imposed . . . ." Attorney General v. Sheriff of Worcester County, 382 Mass. 57, 60-61 (1980) citing St. 1955, c. 770 § 31; Report and Recommen-

---

[20] According to the statute, an isolation unit "must provide light, ventilation and adequate sanitary facilities, may contain a minimum of furniture, and shall provide at least one full meal daily." G.L. c. 127 § 40.

[21] Plaintiffs' evidence that some inmates have exhibited signs of mental disturbances as a result of their DDU confinement represents only a small percentage of the men who have been confined in the DDU.

dations of the Governor's Committee to Study the Massachusetts Correctional System, 1955 Senate Doc. No. 750 at 43; McGrath, Criminal Law, Procedure, and Administration, 1955 Ann. Survey Mass. Law 119, 127-127. According to Fred Butterworth, who was employed by the DOC from 1950 until 1986, inmates serving isolation sanctions from 1956 until 1972 were housed in cells without windows, were prohibited from communicating with each other, were generally confined to their cells twenty-four hours per day, were not offered exercise, and were provided with no reading material other than a religious book. Further, these inmates had no regularly scheduled medical visits, no social visits, showers, telephone calls, television, or radio. Thus, the isolation that followed the 1955 reform of the Massachusetts penal system was considerably more restrictive than the DDU. The conditions of the DDU do not reflect the "isolation" contemplated by the Legislature.[22] See Abrazinski, 876 F.Supp at 319 n. 9.

Although the Legislature clearly sought to end the barbaric conditions existing prior to 1955, it does not appear that its intent was as far-reaching as plaintiffs assert: the statute does not place a fifteen-day limit on any confinement which may be mentally harmful. Furthermore, DOC's interpretation that the DDU is not an isolation unit under G.L. c. 127, § 40 must be given substantial deference. Gateley's Case, 415 Mass. 397, 399 (1993). Consequently, the defendants are entitled to summary judgment on Count III.

---

[22] It is noteworthy that the Legislature defined isolation in terms of the conditions of confinement and not in terms of the effect of such confinement. See G.L. c. 127, § 40 par. 2.

Count IV: Supervision

See page 19 infra.

Count V: G.L c. 127, §§ 32

In Count V, plaintiffs allege that "the DOC defendants have failed to treat plaintiffs with the kindness required by their circumstances in violation of G.L. c. 127, §§ 32 and 39." General Laws c. 127, § 32 mandates that DOC "treat the prisoners with the kindness which their obedience, industry and good conduct merit." In Blaney v. Commissioner of Correction, 374 Mass. 337 (1978), the court held that the purpose of the statute is to assure equal treatment "for prisoners who are not being disciplined." Blaney, 374 Mass. at 341. Therefore, G.L. c. 127, §32 does not apply to inmates who are being disciplined such as those in the DDU.

Plaintiffs argue in rebuttal that § 32 should apply to those inmates in the DDU because the unit serves a classification function, as the DSU had, and not merely a disciplinary function. Plaintiffs cite Hoffer v. Fair, S.J.C. Suffolk No. 85-71 (Judgment #11, Mar. 3, 1988), in contending that because Justice Liacos recognized that the DSU served a classification and a disciplinary function but applied § 32 to the treatment of DSU inmates, this court should apply §32 to the DDU. Contrary to plaintiffs' assertion, however, Justice Liacos recognized that "DSU placement appears to be considered as one possible response to disciplinary infractions, but not as punishment for those infractions," Hoffer v. Fair, supra at 17, and ruled that "[i]f DSU placement is not an integral component of the institution's internal punishment process . . . then it is appropriate to apply § 32 . . ." Hoffer v.

Fair, supra at 40.[23] Unlike the DSU, the DDU is an integral component of the inmate punishment process. Therefore, regardless of the DDU's ancillary classification function, G.L. c. 127, § 32 does not apply.[24]

Defendants' motion for summary judgment is allowed on Count V, without prejudice to plaintiffs asserting individual claims where declaratory judgment, injunctive relief, or damages to correct the particular inadequacies would be appropriate.

Counts V1 and VII: Access to Written Materials

Plaintiffs complain that "[b]y denying plaintiffs access to educational materials and by otherwise arbitrarily restricting plaintiffs in their access to written material and the communication of ideas, the DOC defendants have violated plaintiffs' rights under the First and Fourteenth Amendments [and under Article 16 of the Massachusetts Declaration of

---

[23] The thrust of the decision was that although DSU classification is not a means of discipline, because "the reality usually is experienced as restriction and discipline . . . Departmental segregation, with an impact which may well exceed that of a disciplinary proceeding, ought to be governed by procedures which require no less than that required in a disciplinary hearing." Hoffer at 23.

[24] Neither plaintiffs nor defendants have addressed the allegation in Count V that the DOC defendants have violated G.L. C. 127, § 39. In addition to mandating the conditions of segregated units, G.L. c. 127, § 39 provides the process by which an inmate may be transferred to such a unit. This procedure is not that which is utilized to sentence an inmate to the DDU, however.

Rights]."[25] Defendants contend that the ban on educational and rehabilitative materials in the DDU cells is constitutional according to the four factors announced in Turner v. Safley, 482 U.S. 78 (1987).[26] However, the record before this court does not demonstrate that the ban on educational materials is reasonably related to legitimate penalogical interests as a matter of law. See Affidavit of E. Eugene Miller, and Lovell v. Superintendent. North Central Correctional Institution, 26 Mass. App. Ct. 35, 36-38 (1988). Consequently, summary judgment for the defendants on these counts is not appropriate.

---

[25] It is unclear what policy, other than that which forbids inmates from having educational materials in their cells, plaintiffs are challenging in counts VI and VII. The only prayer for injunctive relief which relates to these counts asks that "DDU prisoners [be allowed] access to educational materials in their cells." Further, this issue is the only one pressed by the plaintiffs with respect to these counts despite the fact that the defendants have also raised the DOC's ban on inmate-to-inmate correspondence, the restrictions on DDU inmates' participation in rehabilitative and educational programs, the ban on contact visits, and the ban on correspondence courses and textbooks. Because the defendants' evidence that these policies have legitimate penological purposes remains unrebutted, they are entitled to summary judgment to the extent that these policies are at issue.

[26] The four factors are: (1) whether there is a valid, rational, connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether the inmates may exercise the right through alternative means; (3) the impact accommodation of the right would have on guards, other inmates, and the allocation of resources; (4) the absence of ready alternatives. Lovell v. Superintendent, North Central Correctional Institution, 26 Mass. App. Ct. 35, 38 n.6(1988) citing Turner, 482 U.S. at 89-91.

Count VIII: 105 Code Mass. Regs. 451.212

"Unless security or safety considerations dictate otherwise, each inmate should be afforded the opportunity for recreation and exercise for personal enjoyment and physical fitness outside of his cell . . . Each inmate within the special management or disciplinary units shall be afforded not less than one hour per day, five days a week, of exercise outside his cell." 105 Code Mass. Regs. 451.212 (B). Plaintiffs seek a declaration that the DOC has violated this regulation and an injunction to prevent further violation.

Defendants admit that prior to the Fall of 1995, inmates were denied exercise as a form of punishment. This practice has since ceased, however. In fact, plaintiffs acknowledge that DDU inmates are offered outdoor exercise, one hour a day, five days per week. Consequently, the defendants assert that the plaintiffs' claim with respect to defendants' violation of 105 Code Mass. Regs. 451.212 is moot. See Layne v. Superintendent, MCI-Cedar Junction, 406 Mass. 156, 160 (1989).

Plaintiffs contend that their claim is not moot because the new policy does not provide for indoor exercise outside of their cells during inclement weather.[27] According to plaintiff MacDougall, he could not exercise on several occasions due to inclement weather.[28] 105 Code Mass. Regs. 451.212(B)

---

[27] Plaintiffs also contend that they are entitled to equitable relief to ensure DOC compliance with 105 Code Mass. Regs. 451.212. Injunctive relief is not appropriate based on a speculation about a future violation.

[28] During its tour of the DDU in May, 1996, the court observed that the units' outdoor exercise area consisted of a series of long and narrow, 'dog run', type enclosures, surrounded on the top and all sides by

requires the DOC to allow one hour per day of exercise. Because there is evidence that they have failed and continue to fail to provide this exercise to DDU inmates during inclement weather, summary judgment is not appropriate.[29] Unless the defendants can show that security and safety considerations make indoor exercise impossible, plaintiffs may be entitled to the declaratory and injunctive relief they seek. See Amended Complaint, par. f at 35; par. 10 at 38.[30] Summary judgment on this count must be denied.

Counts IX and X: Access to the Courts

In Bounds v. Smith, 430 U.S. 817 (1977), the United States Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds, 430 U.S. at 828. Defendants contend that plaintiffs cannot demonstrate a systemic problem with respect to DDU inmates' access to the courts because they are

---

chain-link type fencing, and with no solid roof or other covering sufficient to permit inmates to exercise there in inclement weather.

[29] There is also a genuine issue of material fact regarding whether DDU prisoners are frequently forced to choose between going to counseling sessions and exercise.

[30] Even if plaintiffs demonstrate that defendants violated their rights under 105 Code Mass. Regs. 451.212 during inclement weather and by scheduling counseling sessions, the State Civil Rights Act would not apply because there was no threats, intimidation, or coercion involved and § 1983 would not apply because this is not a Federally guaranteed right.

provided with adequate research time and legal resources. "Where an adequate law library is available to prisoners, courts have found that prisoners' right of access to courts is satisfied." Tolbert v. DuBois, Superior Court C.A. No. 95-3862 (Middlesex, April 29, 1996), citing Bounds, 430 U.S. at 824. "At least where an adequate library exists, however, there is no separate right to the assistance of trained staff." Tolbert v. DuBois, supra at 3, citing Bounds, 430 U.S. at 828. "[A]s long as books are reasonably available, there is no constitutional right to have them in a given place or to have them constantly at the ready." Tolbert v. DuBois, supra at 4.

Plaintiffs rely principally on the affidavits of _____ to demonstrate that the DOC does not provide the DDU inmates with sufficient legal materials, research time, or photocopying services. These affidavits raise issues of material fact regarding deficiencies in these inmates' access to the courts.

However, notwithstanding this dispute, plaintiffs must produce evidence of system-wide injury in order to succeed on their systemic challenge. The Supreme Court recently elaborated on Bounds in Lewis v. Casey, 116 S.Ct. 2174 (1996). In Lewis, the Court ruled that "the success of [the inmates'] systemic challenge was dependent on their ability to show widespread actual injury . . ." Lewis, 116 S.Ct. at 2179. Thus, if the plaintiffs do not demonstrate widespread actual injury, "[t]he remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff[s] ha[ve] established." Lewis, 116 S.Ct. at 2183.

Only four plaintiffs have presented evidence of actual injury in connection with existing or contemplated litigation.[31] This evidence is insufficient to establish widespread actual injury sufficient to deny summary judgment for the defendants on Counts IX, and X. The plaintiffs' evidence is sufficient, however, to allow these plaintiffs to proceed with their individual claims. If they succeed in demonstrating that they have sustained injury related to an existing or contemplated non-frivolous claim, and that the injury is the result of DOC's failure to provide adequate access to adequate law libraries or assistance from persons trained in the law, then declaratory judgment or injunctive relief to correct the particular inadequacies which caused their injuries would be appropriate.

Count XI: G.L. c. 12, §§ 11H and 11I

Defendants maintain that the plaintiffs cannot meet their burden to demonstrate that their rights under the Massachusetts Civil Rights Act, G.L. c. 12, §§ 11H and 11I, have been violated. Plaintiffs have not adduced facts to show that the named defendants have coerced, threatened, or intimidated

---

[31] _____ claims that he was unable to challenge his federal bank robbery conviction. _____ maintains that he was unable to file a complaint regarding a disciplinary proceeding. _____ asserts that he could not file a claim against DOC relating to inadequate health care. _____ states that he was unable to pursue an appeal after losing a Superior Court action arising from his deprivation of contact visits. _____ also claims injury in that the Probate and Family Court ruled adversely to him.

This latter injury is irrelevant because resources on family law are not "[t]he tools . . . that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." Lewis, 116 S.Ct. at 2182.

them. However, according to the affidavit of _____ corrections officers threatened that if _____ complained about the meals, he would be denied food and if he continued to ask to see a doctor, he would receive a disciplinary report. According to the affidavit of _____ he was told by corrections officers that if he filed suit against them he would be physically harmed.

There is no respondeat superior liability for G.L c. 12, §§11H and 11I violations, however. See Lyons v. National Car Rental Systems, Inc., 30 F.3d 240, 244-247 (1st Cir. 1994) and cases cited. Although plaintiffs have submitted evidence that their rights have been violated, plaintiffs have not provided evidence that the named defendants, themselves, interfered with the plaintiffs' rights through threats, intimidation, or coercion. Further, "[a] direct violation of a persons' rights does not by itself involve threats, intimidation, or coercion and thus does not implicate the Act." Longval v. Commissioner of Correction, 404 Mass. 325, 333 (1989). Thus, the establishment and operation of the DDU and the conditions of plaintiffs' confinement, even if violative of their rights, does not implicate the Massachusetts Civil Rights Act.

Qualified Immunity

Plaintiffs seek relief against the DOC defendants through G.L. c. 12, §§ 11H and 11I, the Massachusetts Civil Rights Act, and through 42 U.S.C. § 1983. Plaintiffs seek damages as well as injunctive and declaratory relief. Because this action has been bifurcated, this decision is aimed principally at plaintiffs' claims for declaratory relief. The individual defendants have moved for summary judgment based on qualified immunity with respect to plaintiffs' claims for damages

under G.L. c. 12, §§11H and 11I and 42 U.S.C. § 1983, however.[32] Because qualified immunity under these statutes provides immunity from suit and not merely from liability, see Breault v. Chairman of the Board of Fire Commissioners of Springfield, 401 Mass. 26, 31 and 34-35 n. 9 (1987), cert. denied, 485 U.S. 906 (1988), the question of its application affects not only the damages issue but also the propriety of the action itself. Therefore, it is appropriate, and not in derogation of the Case Management Order, to address the issue here.

The doctrine of qualified immunity applies to claims under G.L. c. 12, §§ 11I and 11H, as well as to 42 U.S.C. § 1983. Duarte v. Healy, 405 Mass. 43, 46 (1989). But it applies only to discretionary functions. Duarte, 405 Mass. at 47 citing Dobos v. Driscoll, 404 Mass. 634, 646 (1989), cert. denied, 493 U.S. 850 (1989). Plaintiffs argue that they are challenging the daily operation of the DDU which is non-discretionary. However, plaintiffs have not attacked particular acts of the defendants except to the extent that they have alleged that the regulations promulgated and the procedures followed by the defendants violate plaintiffs' rights. These acts are clearly discretionary. See Duarte, 405 Mass. at 48 citing Davis v. Scherer, 468 U.S. 183 (1984) (where a law does not "specify the precise action that the official must take in each instance[,] it creates only discretionary authority."). See also Duarte, 405 Mass. at 48 n. 3 (distinguishing discretionary functions under G.L. c. 258).

Consequently, defendants are not individually liable "unless their actions violated [plaintiffs'] rights that were 'clearly established' under the relevant law." Duarte, 405

---

[32] Plaintiffs have not alleged violations of the State and Federal Civil Rights Acts by the DMH defendants.

Mass. at 48. "[P]laintiffs must show that the defendants directly participated in violating [these] rights." O'Malley v. Sheriff of Worcester County, 415 Mass. 132, 142 (1993). Further, plaintiffs' rights must be clearly established so that a reasonable official would understand that his or her acts violate those rights. See Id. and cases cited. See also Breault, 401 Mass. at 26 (immunity withheld if officials intentionally violate G.L. c. 12 §§ 11I and 11H).

Plaintiffs cite Madrid v. Gomez, 889 F.Supp. 1146 (N.D.Cal. 1995), to support their blanket contention that inmates cannot be held in conditions which put them at severe risk of mental illness. However, "there is no static test for determining whether the conditions of an inmate's confinement are 'cruel and unusual' . . .." Morris v. Travisono, 549 F.Supp. 291, 294 (D.R.I. 1982), aff'd 707 F.2d 28 (1st Cir. 1983). "The term 'cruel and unusual punishment' is relative rather than absolute." Davenport v. DeRobertis, 844 F.2d 1310, 1315 (7th Cir. 1988), cert. denied, 488 U.S. 908 (1988). Extended segregated confinement is not unconstitutional per Travisono, 449 F.Supp. 149, 160 (D.R.I. 1980).

In the cases upon which plaintiffs rely, the conditions were not identical to those in the DDU. See e.g. Morris, 549 F.Supp. at 292 (no visitors, one book per week); Davenport, 844 F.2d at 1314 (not clear error to hold one hour per week of exercise falls below Eighth Amendment standards); Madrid, 889 F.Supp. at 1161-1171 (overwhelming evidence of excessive force, use of fetal restraints, and cagings), Madrid, 889 F.Supp. at 1228-1229 (no windows in cells, walled exercise areas). Thus, it has not been clearly established that conditions such as those in the DDU violate inmates' rights. Consequently, a reasonable official, in the position of the

defendants, would not understand that his acts, in establishing the conditions of the DDU, violated plaintiffs' rights.[33]

This conclusion is not contrary to the ruling that a question of fact exists whether defendants violated the plaintiffs' Eighth Amendment rights. Although there is evidence that defendants were indifferent to a risk of substantial harm as required for an Eighth Amendment claim, see Farmer, 114 S.Ct. at 1977, because it is not clear what constitutes cruel and unusual punishment, defendants did not violate a known right. See McGuinness v. DuBois, 893 F.Supp. 2, 3 (D.Mass. 1995) (although deprivation of exercise may constitute a violation of the Eighth Amendment, "the state of the law in this area does not clearly establish that the conditions of [plaintiff's] confinement violated the Constitution. The defendants are therefore entitled to qualified immunity . . .") (emphasis added).

State Sovereign Immunity

Although the Eleventh Amendment does not apply to suits brought in State courts, a state agency or a state official in an official capacity may not be sued for retrospective relief under § 1983 because a State is not a "person" under that statute. See Will v. Michigan Dept. of State Police, 491 U.S.

---

[33] Plaintiffs have not argued that other rights at issue were clearly established. The DOC defendants would be entitled to summary judgment on the basis of qualified immunity with respect to the particular instances of excessive force, inadequate health care, etc., because the defendants had no personal involvement in these events and there is no evidence that they intentionally failed to fulfill their statutory duties. O'Malley, 415 Mass. at 142-143. Further, although Maloney heard the inmates' appeals from the DDU sentences, plaintiffs have not alleged any wrongdoing in this respect.

58, 70 (1989). Prospective relief is available, however. Will, 491 U.S. at 71 n. 10. See also Martin A. Schwartz & John E. Kinklin, 1 Section 1983 Litigation, 2nd ed. (1991) § 8.14.

In Commonwealth v. ELM Medical Laboratories, Inc., 33 Mass. App. Ct. 71 (1992), the court held that the State is not a "person" under the State Civil Rights Act. Id. at 76. Thus, G.L. c. 12, §§ 11H and 11I did not abolish sovereign immunity. Ibid. at 80. See also Converse Const. Co., Inc. v. Mass. Bay Transp. Auth., 899 F.Supp. 753, 762 (D.Mass. 1995).[34]

In light of the bifurcation of this action, it may seem premature to point out that plaintiffs are not entitled to damages against the defendants in their official capacities. It is appropriate, however, because, unless plaintiffs' claims for damages are viable, their claims for declaratory relief are moot. In sum, because there is sovereign immunity, if at trial it is determined that defendants are individually entitled to qualified immunity, plaintiffs will have no viable claims for damages, thus rendering several plaintiffs' claims for declaratory relief moot.

Counts XII and XIII: Federal and State Due Process Claims

Counts XII and XIII assert violations of procedural due process. Plaintiffs assert that the administrative disciplinary process on its face and as applied violate plaintiffs' federal and state due process rights.

---

[34] Contrast Monell v. Dept. of Social Services of New York, 436 U.S. 658 (1978) (municipal liability under § 1983); Broderick v. Roache, 803 F.Supp. 480, 484-485 (D.Mass. 1992) (municipal liability under G. L. c. 12 §§ 11H and 11I). But see ELM, 33 Mass. App. Ct. at 76 n. 8. ("We express no opinion with regard to the immunity . . . of municipalities. . . under the State Civil Rights Act.").

Plaintiffs contend that inmates repeatedly have not been given notice of disciplinary hearings or were prevented from attending their own hearing. (_____ Aff., par. 11; _____ Aff., pars. 2-5; _____ Aff. pars. 7-9). DDU inmates have been denied opportunity to present evidence and witnesses. (_____ Aff., par. 6; _____ Aff., par. 15). _____ all experienced being given written notice of a hearing which they were not given an opportunity to attend. (_____ Aff., par. 11; _____ Aff., pars. 2-5; _____ Aff., pars. 7-9).

In _____ Judge Dortch-Okara found that _____ due process rights were violated at two "special" disciplinary hearings by denial of his right to present four inmate witnesses and denial of an opportunity to make an oral statement, resulting in his being sentenced to the DDU. _____9.

At a November 1992 hearing, _____ was denied the opportunity to present evidence on his own behalf, without any justification being given for the denial. Each time _____ tried to speak, Special Hearing Officer Sherwin cut him off, telling him to "shut up." (_____ Aff., par. 6). _____ was sentenced to the DDU after this hearing.

Plaintiff _____ was denied the opportunity to present witnesses without being given a justification for the denial. Prior to the hearing, in conformance with DDU policy, he had requested the presence of a corrections officer as a witness. The C.O. did not appear at the hearing and the report in connection with the hearing falsely indicated that _____ did not request any witnesses. _____ received a two year DDU sanction.

A. Federal Due Process Claims

In Sandin v. Conner, 115 S. Ct. 2293 (1995), respondent was an inmate who brought a civil rights action against prison officials and the state of Hawaii challenging the imposition of disciplinary segregation for misconduct. Conner alleged that prison officials deprived him of procedural due process when an adjustment committee refused to allow him to present witnesses during a disciplinary hearing and then sentenced him to segregation for misconduct. Sandin, 115 S.Ct. at 2294.

In its opinion the Supreme Court revisited Hewitt v. Helms, 459 U.S. 460 (1983), and determined that Hewitt produced two undesirable effects. First, that it created "disincentives for States to codify prison management procedures in the interest of uniform treatment. Prison administrators need be concerned with the safety of the staff and inmate population. Ensuring that welfare often leads prison administrators to curb the discretion of staff on the front line who daily encounter prisoners hostile to the authoritarian structure of the prison environment. Such guidelines are not set forth solely to benefit the prisoner. They also aspire to instruct subordinate employees how to exercise discretion vested by the State in the warden, and to confine the authority of prison personnel in order to avoid widely different treatment of similar incidents. The approach embraced by Hewitt discourages this desirable development: States may avoid creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel." Sandin, 115 S.Ct. at 2299.

Second, the Supreme Court determined that "the Hewitt approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judi-

cial resources with little off-setting benefit to anyone. In so doing, it has run counter to the view expressed in several of our cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." Sandin, 115 S.Ct. at 2299.

The Supreme Court concluded that, "[t]he time has come to return to the due process principles we believe were correctly established and applied in Wolff and Meachum. Sandin, 115 S.Ct. at 2300. The Court held that the States may still create liberty interests that afford prisoners Federal due process protections, but explained: '[T]hese interest will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" (emphasis added). Sandin, 115 S.Ct. at 2300.

"By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges. . . . Not only are . . . regulations not designed to confer rights on inmates, but the result of the negative implication jurisprudence is not to require the prison officials to follow the negative implication drawn from the regulation, but is instead to attach procedural protections that may be of quite a different nature." Sandin, 115 S.Ct. at 2299.

The United States Court of Appeals for the First Circuit in Dominique v. Weld, 73 F.3d 1156 (1st Cir. 1996), applied the holding of the Sandin opinion to an inmate who was removed from a prerelease facility despite his good standing in a work-release program and transferred to the Massachusetts

Correctional Institution, at Shirley, a medium-security facility. Hastings v. Commissioner of Correction, 424 Mass. 46, 51, 52 (1997); citing Dominique, 73 F.3d at 1159. "The court held that the removal and transfer did not, in the words of the Sandin case, constitute an 'atypical hardship' and, consequently, no Federal right of due process had been violated." Hastings, 424 Mass. at 52.

In the present case, plaintiffs' federal due process claims are foreclosed by Sandin and Dominique. The facts alleged by the plaintiffs do not support any claim of system-wide violations of plaintiffs' federal or state due process rights by the defendants.

B. State Due Process Claims.

Prison disciplinary proceedings must comport with certain minimal requirements. "[D]ue process requires that before a prisoner can be deprived of a State-created liberty interest he must be given advance written notice of the alleged violation of the disciplinary rules, he must be accorded impartial tribunal, and must be given 'a written statement by the fact finders as to the evidence relied upon and the reasons for the disciplinary action taken.' . . . The Court also stated that an inmate should be allowed to call witnesses if to do so will 'not be unduly hazardous to institutional safety or correctional goals.' A disciplinary board, at its discretion, may refuse to call a witness requested by an inmate on the grounds of 'irrelevance, lack of necessity, or the hazards presented in individual cases.'" Nelson v. Commissioner of Correction, 390 Mass. 379, 389, 390 (1983).

Defendants assert that twenty-four hours' notice of a prison disciplinary hearing is constitutionally sufficient notice. O'Malley v. Sheriff of Worcester County, 415 Mass.

132, 140 n. 12 (1993). Further, DOC regulations require that inmates receive at least twenty-four hours' notice prior to a disciplinary hearing. 105 C.M.R. 430.11(2).

Further, "[c]onfrontation and cross-examination of adverse witnesses may create a high risk of reprisal in a prison system; hence, the Supreme Court has left the exercise of the right to confrontation and cross-examination in disciplinary hearings to the discretion of prison officials." Nelson v. Commissioner of Correction, 390 Mass. at 390.

In Hastings v. Commissioner of Correction, 424 Mass. 46 (1997), the plaintiffs, six inmate serving life sentences for convictions of murder in the second degree, sought injunctive and declaratory relief, damages, and attorney's fees in connection with an administrative order of the Commissioner of Correction. The order transferred all inmates serving life sentences, who had been denied parole two or more times, from prerelease facilities to higher security institutions. Plaintiffs contended, that among other violations, the order violated their due process rights under the Federal and State Constitutions. Defendants' motion for summary judgment was allowed and plaintiffs' cross-motion for summary judgment was denied. On appeal, the SJC concluded that summary judgment was proper. Hastings, 424 Mass. at 47.

In Hastings, the Supreme Judicial Court determined that, where the commissioner's administrative order does not affect the duration of plaintiffs' sentences or subject them to conditions different from those customarily applied to other inmates serving similar sentences for the same type of crime, plaintiffs "cannot claim a liberty interest in continuing in work-release programs sufficient to su[p]port a claim under the State Constitution that they were entitled to due process before what essentially constitutes a privilege could be revoked." Hastings, 424 Mass. at 52.

Accordingly, plaintiffs have no claim. Plaintiffs' claims based on state due process laws must fail.

C. Statute of Limitations

To challenge their disciplinary proceedings and vindicate their state-based claims, the individual plaintiffs should have brought an action in the nature of certiorari within sixty days of the final decision.[35] See Pidge v. Superintendent, Massachusetts Correctional Institution, Cedar Junction, 32 Mass. App. Ct. 14, 17 (1992); G.L. c. 249 § 4. Their failure to do so is fatal to their State-based due process claims. Pidge, 32 Mass. App. Ct. at 17, 18.[36]

"The right to bring an action in the nature of certiorari for the failure of prison officials to adhere to Department of Correction regulations exists only by virtue of the certiorari statute, G.L. c. 249, §4." Ford v. Commissioner of Correction, 27 Mass. App. Ct. 1127, 1129 (1989). This statute had in-

---

[35] Indeed, both _____ have previously brought actions in the Superior Court alleging due process violations in other disciplinary proceedings.

[36] "Inmates challenging alleged improprieties in prison disciplinary proceedings under State law must proceed by way of an action in the nature of certiorari." Pidge v. Superintendent, Massachusetts Correctional Institution, Cedar Junction, 32 Mass. App. Ct. 14, 17 (1992). "Certiorari actions must be commenced within sixty days after the conclusion of the proceeding being challenged. . . . Failure to do so is such a 'serious misstep' that such an action must be dismissed when not timely filed, even if the defendants fail to plead the statute of limitations as an affirmative defense." Pidge, 32 Mass. App. Ct. at 17, 18. "[A] State cannot apply a shorter time limit, such as the sixty-day period of G.L. c. 249, § 4, to a substantive Federal right properly asserted in a State court." Pidge, 32 Mass. App. Ct. at 19.

cluded a requirement that actions brought pursuant to it be commenced within two years of the proceeding being challenged. This was shortened to sixty days by St. 1986, c. 95. "The legislative intent to impose a shortened period for bringing claims of this nature is evident from the 1986 amendment . . . reducing the limitations period to sixty days." Ford, 27 Mass. App. Ct. at 1129. "[G]iven the vast number of prison disciplinary proceedings, it is reasonable to require such claims to be brought promptly so that prison officials may respond while they still have some memory of the relevant events and may retry serious infractions if the proceedings complained of were procedurally inadequate." Ford, 27 Mass. App. Ct. at 1129.

However, as the Appeals Court stressed in Pidge, 32 Mass. App. Ct. at 19, it is doubtful that the sixty-day limitations period of G.L. c. 249, §4 may cut off a Federal law claim which under Federal law, would have a longer limitations period. Although there is no Federal liberty interest regarding disciplinary isolation, see O'Malley, 415 Mass. at 136; Parenti v. Ponte, 727 F.2d 21, 23 (1st Cir. 1984); contrast e.g. Wolff, 418 U.S. at 546, (liberty interest in loss of good-time credits earned),[37] the liberty interest created by State law "acquires the protection of the Fourteenth Amendment." Smith v. Massachusetts Dept. of Correction, 936 F.2d 1390, 1396 (1st Cir. 1991) citing Hewitt v. Helms, 459 U.S. 460, 466 (1983). The Fourteenth Amendment claims of these three plaintiffs are, therefore, not barred by the sixty-

---

[37] DDU inmates may not earn good time credits. But because awarding good time credits is discretionary, see G.L. c. 127, §129D, no liberty interest is involved. See MacDougall v. Dubois, Civil No. 93-3032-D (Middlesex Super. Ct. Jun. 27, 1994).

day limitation of G.L. c. 249, § 4[38]. See Pidge, 32 Mass. App. Ct. at 19.

Though plaintiffs' federally based due process claims may not be barred by the 60 day statute of limitations, plaintiffs' federal due process claims are foreclosed by the decisions reached in Sandin and Dominique. The facts alleged by the plaintiffs do not support any claim of system-wide violations of plaintiffs' federal or state due process rights by the defendants.

D. Challenges to the Regulations

Plaintiffs first challenge the administrative disciplinary procedure set forth in 103 Code Mass. Regs. 430.11.[39] "It is

---

[38] The adequacy of the procedure afforded these inmates will, of course, be scrutinized according to the Federal due process requirements enunciated in Wolff, 418 U.S. at 563-570: (1) an inmate must be given at least twenty-four hours advance notice of the charges; (2) there must be a written statement, by the factfinders, of the reasons for the disciplinary action and the evidence upon which they relied; and (3) an inmate must be allowed to present witnesses and documentary evidence in his defense if this is not unduly hazardous to institutional safety or correctional goals; (4) but an inmate need not be afforded the right to confrontation, cross-examination, or counsel. If these three plaintiffs demonstrate that defendants denied them the opportunity to call witnesses, defendants may justify this action at trial. See Smith, 936 F.2d at 1399. See also Ponte v. Real, 471 U.S. 491 (1985) vacating Real v. Superintendent, Massachusetts Correctional Institution, Walpole, 390 Mass. 399, 406 (1983).

[39] 103 Code Mass. Regs. 430.11 provides, in pertinent part, "(2) The disciplinary officer shall schedule a hearing before a hearing officer within a reasonable time, but not less that 24 hours after the inmate has been served with both the disciplinary report and the notice specifying the time of hearing. The disciplinary officer or hearing officer may con-

a recognized principle of administrative law that an agency may adopt policies through adjudication as well as through rulemaking, . . . and 'the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.'" Hastings, 424 Mass. at 49. Further, declaratory judgment is the proper vehicle for determining the validity of an administrative regulation. See Nelson v. Commissioner of Correction, 390 Mass. 379, 386-388 (1983); Averett v. Commissioner of Correction, 25 Mass. App. Ct. 280, 287 (1988), rev. granted, 402 Mass. 1102, rev'd on other grounds, 404 Mass. 28 (1989).

Plaintiffs assert that the regulation is constitutionally flawed because a prisoner may have as little as twenty-four hours notice of a disciplinary hearing. But twenty-four hours notice is not constitutionally inadequate on its face. See Wolff v. McDonnell, 418 U.S. 539, 504 (1974); O'Malley v. Sheriff of Worcester of County, 415 Mass. 132, 134-140 (1993). Further, the regulation allows an inmate to seek a continuance for good cause which provides additional due process protection. Plaintiffs have adduced no evidence to suggest that they have been denied continuances when necessary to prepare adequately for a disciplinary hearing. Consequently, plaintiffs cannot demonstrate that the twenty-four hour notice provision is invalid.

Plaintiffs next allege that the DOC regulations violate due process because they do not contain standards to determine which prisoners should be confined to the DDU. However, only prisoners who have been found guilty of a major disci-

---

tinue a hearing at his discretion. The inmate shall be entitled to one continuance for good cause provided that any request for a continuance for good cause provided that any request for a continuance must ordinarily be made at least 24 hours prior to the scheduled time of the hearing."

plinary infraction may be sentenced to the DDU. If plaintiffs contend that due process requires standards to differentiate among inmates who have been found guilty of major violations to determine the propriety of a DDU sanction, they neither cite authority for that contention nor provide evidence that defendants have unfairly differentiated among such prisoners.[40] Further, the DOC has promulgated guidelines for determining whether an offense is major or minor. See 103 Code Mass. Regs. 430.09(4).

Plaintiffs challenge the failure of the regulations to guarantee counsel or provide a right to confront and cross-examine witnesses. However, it is clear that due process under the Fourteenth Amendment does not require such provisions in prison disciplinary proceedings. See Wolff, 418 U.S. at 570. Further, plaintiffs cite and this court is aware of no such rights provided by State law. See generally Murphy v. Superintendent, Massachusetts Correctional Institution, Cedar Junction, 396 Mass. 830, 832 (1986); O'Malley, 415. Mass. at 138. Plaintiffs' claims that the regulations do not provide for compulsory process and other amorphous attacks are similarly unavailing.

E. Challenges to implementation of Disciplinary Procedures

Plaintiffs further allege that defendants have violated their federal and state due process rights by failing to implement their disciplinary procedures properly. However, only three of the eleven plaintiffs, which constitutes a small percentage of the DDU population, have provided evidence of constitu-

---

[40] Plaintiffs have not argued that the regulations violate their rights under the Equal Protection Clause. This court therefore need not and will not address this issue.

tional infirmities in their disciplinary proceedings.[41] All three inmates have been released from the DDU. Moreover, these isolated incidents do not establish a common DOC practice "involving violations of rights, which [is] consistent and repeated in nature," and are therefore not properly resolved through this declaratory judgment action. Nelson, 390 Mass. at 388 n. 12; G.L. c. 231A, §2.

"In Hewitt v. Helms, 459 U.S. 460 (1983), the Supreme Court held that inmates placed in administrative segregation prior to a disciplinary hearing have certain limited due process rights: Prison officials are 'obligated to engage only in an informal, non-adversary review of the information supporting [the prisoner's] administrative confinement, including whatever statement [the prisoner] wished to submit, within a reasonable time after confining him to administrative segregation.'" Leacock v. DuBois, et al., (United States District Court, District of Massachusetts, Civil Action No. 93-12236-GAO) (O'Toole, J.) (1996). Minimum due process includes: "(1) written notice of the claimed violation; (2) a

---

[41] Plaintiffs , now known as maintain that they were not given an opportunity to appear at disciplinary hearings charging violations while they were already confined to the DDU and, contrary to the reports of the hearings, they did not refuse to appear. See 103 Code Mass. Regs. 430.11(3) and 430.14(2). As a result of these hearings, lost yard privileges and visits and received seven days in isolation. also asserts that at another proceeding which resulted in his DDU sentence, he was not allowed to make a statement. See 103 Code Mass. Regs. 43012(3). Plaintiff asserts that, while he was serving a DDU sentence, he requested the appearance of a corrections officer to testify at a disciplinary hearing which resulted in an additional two-year DDU sentence. The officer did not appear and the report generated from the hearing falsely indicated that did not request witnesses. See 103 Code Mass. Regs. 430.11(5).

qualified right to call witnesses and present evidence in response to the claim; and (3) a written statement of the fact-finders as to the evidence relied upon and the reasons for the action." Leacock v. DuBois, supra.

In the present case, _____ were allegedly given written notice of a hearing which they were then not permitted to attend. (_____ Affidavit, par. 11; _____ Affidavit, pars. 2-5; _____ Affidavit, pars. 7-9). Judge Dortch-Okara found that _____ due process rights were violated at two "special" disciplinary hearings, which resulted in his being sentenced to the DDU. _____. Further the court found that _____ was denied an opportunity to make an oral statement in violation of his due process rights. (Id at 6). _____ was denied the opportunity to present evidence in his own behalf at a hearing held on _____. No justification was given for the denial. Each time he tried to speak, Special Hearing Officer Sherwin cut him off, telling him to "shut up." (_____ Affidavit, par. 6). _____ was then sentenced to the DDU. _____ was denied the opportunity to present witnesses without being given a justification for the denial. (_____ Affidavit, par. 15) _____ received a two-year DDU sanction and his appeal was denied. (Id.).

F. Res Judicata

The defendants contend that the plaintiffs' due process claims are barred by principles of res judicata because they could have been litigated through the administrative process, see Gloucester Marine Railways Corp. v. Charles Parisi, Inc., 36 Mass. App. Ct. 386, 391 (1994), rev. denied, 418 Mass. 1104, and Almeida v. Travelers Ins. Co., 383 Mass. 226, 230 (1981) (administrative decisions are binding and conclusive

on the parties), and because plaintiffs did not bring an action in the nature of certiorari within sixty days of Maloney's denial of their appeal .[42] But plaintiffs allege due process violations in the regulations themselves and in DOC's application of the regulations.[43]

"[T]he crucial question is not when judicial review is sought but why it is sought." Averett v. Commissioner of Correction, 25 Mass. App. Ct. 280, 287 (1988), reversed on other grounds in 404 Mass. 28 (1989). A complaint for declaratory relief is not "an appropriate remedy where the validity of an adjudication by the board in an individual case is being challenged." However, it "'is an appropriate way of testing the validity of regulations or the propriety of practices

---

[42] An action under G.L. c. 249 § 4 must be brought within sixty days of Maloney's denial of plaintiffs' appeal. Defendants have produced evidence that this action was filed more than sixty days after the final decision of Deputy Commissioner Maloney in all of the plaintiffs' disciplinary proceedings. Each of the eleven plaintiffs appealed a decision assigning him to the DDU to the Commissioner of DOC between May 20, 1992 and August 24, 1993 pursuant to 103 C.M.R. 430.18(3). (McCrosson Aff. par. 6 at 3 (March 18, 1993).

[43] Plaintiffs also challenge the disciplinary procedures used "in imposing disciplinary measures once in the DDU," Amended Complaint, pars. 138 and 141, and allege that "if a corrections officer arbitrarily chooses to classify a prisoner's infraction as 'major,' the prisoner will not receive credit for the prior month served towards his DDU sentence." Amended Complaint, par. 43. The Amended Complaint was not verified; therefore, the allegations contained therein have no evidentiary weight. Godbout v. Cousens, 396 Mass. 254, 262 (1985). Moreover, plaintiffs only seek declaratory and injunctive relief with regard to the procedure utilized to sentence them to the DDU. See Amended Complaint, at 36 pars. 5 and 6; 38 pars. 14 and 15. The regulations controlling disciplinary procedures appear to apply to hearings for those already serving DDU sentences as well as to the remainder of the prison population.

involving violations of rights, which are consistent and repeated in nature.'" Averett, 25 Mass. App. Ct. at 287, quoting Nelson v. Commissioner of Correction, 390 Mass. 379, 388 n.12 (1983). "The importance of the distinction is not found in the label attached to the pleading, that is, declaratory relief under G.L. c. 231A, certiorari pursuant to G.L. c.249, §4, . . . rather, the nature of the grievance will determine the scope of judicial review." Averett, 25 Mass. App. Ct. at 287. "[N]o matter the description given the action by the defendant, the question to be answered is whether the board's decision is supported by substantial evidence." Averett, 25 Mass. App. Ct. at 287. The inmate is not entitled to a hearing de novo in the Superior Court on the propriety of the conduct of his individual disciplinary hearing. Averett, 25 Mass. App. Ct. at 287.

In the present case, the Superior Court decided to bifurcate plaintiffs' declaratory judgment claims which, allege systemic claims against the DDU, from plaintiffs' individual claims for injunctive and compensatory relief. The Court did this in order to provide what it is considered to be a "superior method for the fair and efficient adjudication of the controversy" raised by the putative class action, without "prejudic[ing] any member of the putative class." (Case Management Order, p.2). A controversy exists regarding the constitutionality of the disciplinary mechanism that resulted in plaintiffs' confinement to the DDU. Defendants' arguments for dismissal of aspects of plaintiffs' due process claims are deferred since, under the circumstances stated above, they are not subject to the 60 day statute of limitations applicable to certiorari actions.

CONCLUSION

In 1955, the Governor of the Commonwealth of Massachusetts sent a message to the Senate and House of Representatives with recommendations relative to reorganizing the correctional system of the Commonwealth. The Governor had commissioned a special committee to study the Massachusetts penal system and to submit their report.

According to the report, the philosophy behind the use of isolation and solitary confinement at Concord was without basis, and the methods used were antiquated and ineffective as correctional procedures. (Message from His Excellency the Governor Submitting Recommendations Relative to Reorganizing the Correctional System of the Commonwealth, Senate - No. 750 at 43 (June 9, 1955). Recognition was conceded for the need to segregate certain non-conformists and recalcitrant inmates, but the report "deplored the widespread use of the dark cell and bread and water." Id. "Experience proves that reversion to the use of these barbaric methods is the 'easiest way out,' or the line of least resistance." Id.

The Commonwealth has progressed since its use of dark cells. The DDU is, at best, a clean and modern facility. However, the sterile environment of the DDU and the extended periods of time in which inmates are often confined to the DDU can induce or aggravate a state of mental illness in the condition of some inmates.

In the present case, plaintiffs' complaints and the relief sought are based on assertions of systemic violations. In so far as defendants' motion for summary judgment has been allowed, plaintiffs may assert nonetheless individual claims where declaratory judgment, injunctive relief, or damages to correct the particular inadequacies they have alleged would be appropriate.

ORDER

For the foregoing reasons, with respect to the defendants' Motion for Summary Judgment as to all Counts, it is hereby **ORDERED** that:

1. **Count I** - violations of the Eighth and Fourteenth Amendments of the United States Constitution - 42 U.S.C. § 1983, insofar as it alleges that defendants have deliberately created an environment of sensory deprivation defendants know is likely to cause mental and physical harm to DDU inmates; and defendants encouraged use of excessive force by corrections officers against inmates. It is **ORDERED** that defendants' motion for summary judgment is **ALLOWED** regarding the claim of inadequate medical treatment, without prejudice to plaintiffs who may assert individual claims for injury suffered as a result of inadequate medical treatment; **ALLOWED** as to plaintiffs' claim of use of excessive force, without prejudice to plaintiffs who may assert claims against individual correctional officers for use of excessive force; and **DENIED** as to plaintiffs' claim of inadequate food as it pertains to medically prescribed quantities of food.
2. **Count II** - violations of Article 26 of the Massachusetts Declaration of Rights, insofar as it alleges that confinement of DDU inmates by DOC defendants for extended periods of time under conditions in which defendants deliberately created an environment of sensory deprivation defendants know is likely to cause mental and physical harm to DDU inmates, constitutes cruel or unusual punishment, is **ALLOWED**;

3. **Count III** - insofar as it alleges that defendants committed violations of G.L. c. 1271, § 40 by confining prisoners in the DDU for longer than fifteen days is **ALLOWED**;
4. **Count IV** - insofar as it alleges that defendants committed violations of G.L. c. 127, § 39 by defendants' failure to provide periodic medical and psychiatric examinations to DDU inmates, or to provide the treatment that would have been indicated if DOC defendants had done so, is **DENIED**;
5. **Count V** - insofar as it alleges that defendants have failed to treat plaintiffs with the kindness required by their circumstances in violation of G.L. c. 127, §§ 32 and 39 by denying plaintiffs' rights to due process in the disciplinary hearing process, by denying food and medicine, and by confining plaintiffs in the DDU for extended periods of time, is **ALLOWED**, without prejudice to plaintiffs asserting individual claims where declaratory judgment, injunctive relief, or damages to correct the particular inadequacies would be appropriate;
6. **Count VI** - insofar as it alleges that defendants are in violation of the First and Fourteenth Amendments to the Constitution of the United States – 42 U.S.C. § 1983 by denying plaintiffs access to educational materials, and arbitrarily restricting plaintiffs in their access to written material and communication of ideas, is **DENIED**;
7. **Count VII** - insofar as it alleges that defendants are in violation of Article 16 of the Massachusetts Declaration of Rights by denying plaintiffs access to all educational materials and restricting plaintiffs' access to written material and the communication of ideas, is **DENIED**;
8. **Count VIII** - insofar as it alleges that defendants are in violation of the Department of Public Health Regula-

tions Governing Correctional Institutions - 105 C.M.R. 451.212 by denying plaintiffs of at least one hour per day, five days a week, of exercise outside the cell, is **DENIED**;

9. **Count IX** - insofar as, it alleges that defendants are in violation of United States Constitution - 42 U.S.C. § 1983 by denying plaintiffs' access to the courts and access to an adequate law library or adequate assistance from persons trained in the law, is **ALLOWED**, without prejudice to plaintiffs asserting individual claims where declaratory judgment, injunctive relief, or damages to correct the particular inadequacies would be appropriate;
10. **Count X** - insofar as it alleges that defendants are in violation of Article XI of Massachusetts Declaration of Rights by denying plaintiffs' access to the courts and access to an adequate law library or adequate assistance from persons trained in the law, is **ALLOWED**, without prejudice to plaintiffs asserting individual claims where declaratory judgment or injunctive relief to correct the particular inadequacies would be appropriate;
11. **Count XI** - insofar as it alleges that defendants are in violation of G.L. c. 12, §§ 11H and 11I - Massachusetts Civil Rights Act, alleging that DOC defendants, and person under their supervision, have interfered with plaintiffs enjoyment of rights secured by the laws of the Commonwealth, the Constitutions of the United States and the Commonwealth, through the use of threats, intimidation or coercion, is **ALLOWED**, without prejudice to the individual plaintiffs asserting claims against individual corrections officers;
12. **Count XII** - insofar as it alleges that defendants are in violation of due process under the Fourteenth Amendment to the United States Constitution - 42 U.S.C. §

1983 by denying plaintiffs' constitutional rights to due process by the procedure for sentencing inmates to DDU, and imposition of disciplinary measures once in the DDU, is **ALLOWED**;

13. **Count XIII** - insofar as it alleges that defendants are in violation of plaintiffs' right to due process under the Massachusetts Declaration of Rights by denying plaintiffs their constitutional rights to due process in the procedure by which prisoners are sentenced to the DDU, and by the imposition of disciplinary measures once in DDU in violation of Part II. c. 1. § 1 Article 4 of the Massachusetts Constitution and Articles 1, 10, and 12 of the Massachusetts Declaration of Rights, is **ALLOWED**.

Plaintiff's cross-motion for Summary Judgment for **Count IV**, insofar as it alleges that defendants are in violation of G.L. c.127, § 39 for failure to provide periodic medical and psychiatric examinations to DDU inmates or to provide the treatment that would have been indicated if DOC defendants had done so, is **ALLOWED**.

/s/
Peter M. Lauriat
Justice of the Superior Court

DATED: February 10, 1997

[Appendix A]

Alston v. Fair, D. Mass. Civil No 77-3519-G

ORDER CONCERNING THE DMH'S SUPERVISION OF MEDICAL AND PSYCHIATRIC CARE FOR INMATES IN SEGREGATED UNITS AT MCI, WALPOLE

Section II

DMH Supervision of Medical and Psychiatric care in Segregated Units

The DMH shall supervise the provision of periodic medical and psychiatric examinations and treatments to inmates confined to segregated units at MCI, Walpole as follows:

A. Protocols

The DMH shall within ten days of this Order issue under G.L. c. 127, §39, protocols for the provision of periodic medical and psychiatric examinations and treatments to inmates confined to segregated units at MCI, Walpole. The DMH protocols issued pursuant to this Order shall provide as follows with respect to "segregated units" as defined in this Order:

1. The DOC shall forthwith provide the DMH with a list of all currently segregated units and thereafter with any changes in the list.

2. The DOC shall within three months provide the DMH with proposed written procedures for the provision of periodic medical and psychiatric examinations and indicated medical and psychiatric treatment to inmates in segregated units. The DMH shall review the proposed procedures and prepare a written report of their adequacy, stating separately for each proposed procedure whether it is approved, and if not, how it must be changed to obtain approval. The DMH shall solicit and consider the comments of plaintiffs' counsel and experts before approving any proposed procedures. The DOC's written procedures governing the provision of periodic and medical psychiatric examinations and indicated medical and psychiatric treatment to inmates in segregated units must be approved by the DMH and adopted and implemented by the DOC within six months. Any changes in those written procedures shall be subject to written approval by the DMH.

3. The DOC shall promptly provide the DMH with a list of the physicians and psychiatrists responsible for the provision of medical and psychiatric care to inmates in segregated units, and thereafter with any changes in the list. The DOC shall supply the DMH with copies provided to inmates in segregated units.

4. The DOC shall each month prepare and submit to the DMH a written report listing for each inmate confined to a segregated unit for any time during the preceding month, his name or identifying number, the dates he received medical or psychiatric examination or treatment, and the type of medical or psychiatric examination or treatment he received.

B. Inspections

At least twice each year, the DMH shall inspect MCI, Walpole, including records of confinement of inmates in segregated units and records of the provision of medical and psychiatric examinations and treatments given to inmates in segregated units, and determine whether the DOC has achieved and maintained compliance with the DMH's protocols and has given adequate periodic medical and psychiatric examinations and indicated medical and psychiatric treatment to inmates in segregated units. The first inspection shall be made by September 30, 1981.

C. Reports

1. The DMH shall prepare a comprehensive, detailed written report of each inspection, stating separately for each provision of the protocols the extent and manner in which the DOC has or has not achieved compliance with the protocols and stating the extent and manner, if any, in which the DOC is in the opinion of the DMH failing to provide periodic medical or psychiatric examinations or indicated medical or psychiatric treatment to inmates in segregated units. The DMH shall provide the DOC with copies of each inspection report prepared by the DMH. In addition, the DMH shall provide plaintiffs' counsel during the pendency of this action with copies of each inspection report prepared by the DMH, each plan of correction prepared by the DOC, and each reply or notice of persistent deficiencies prepared by the DMH, or any other inter-agency communications prepared in connection with the DMH inspection described in Part II of this Order or relating in any way to the supervision by the DMH of

the DOC's provision of medical and psychiatric care to inmates in segregated units.

2. The DMH defendants shall on or before November 15, 1981, file in the court a detailed written report of their compliance with the provisions of Part II of this Order, stating separately for each of those provisions the manner in which compliance has been or has not been achieved and the manner in which compliance will be achieved.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. Superior Court
Civil Action No. 94-0270E

VICTOR TORRES, et al.,
Plaintiffs,

v.

LARRY E. DUBOIS, et al.,
Defendants.

ORDER AND ENTRY OF PARTIAL FINAL JUDGMENT

After a hearing, the Court finds no just reason for delay in the entry of final judgment pursuant to Mass. R. Civ. P. 54(b) as to the claims set forth below as to which this Court entered summary judgment in favor of the Defendants. The Court hereby orders that final judgment enter immediately as to the following claims:

1. Plaintiffs' claims in Count I of their Amended Complaint under 42 U.S.C. § 1983 that Defendants violated the Eighth and Fourteenth Amendments to the United States Constitution (a) by deliberately creating an environment of sensory deprivation that Defendants knew was likely to cause mental and physical harm to DDU inmates; (b) by en-

couraging the use of excessive force by corrections officers against inmates; and (c) by providing inadequate medical treatment to DDU inmates.

2. Plaintiffs' claim in Count II of the Amended Complaint that Defendants violated Article 26 of the Massachusetts Declaration of Rights by deliberately creating an environment of sensory deprivation that Defendants knew was likely to cause mental and physical harm to DDU inmates.

3. Plaintiffs' claim in Count III of the Amended Complaint that Defendants violated M.G.L. c. 127, § 40, by confining prisoners in the DDU for longer than fifteen days.

4. Plaintiffs' claim in Count V of the Amended Complaint that Defendants violated M.G.L. c. 127, §§ 32 and 39, by their failure to treat plaintiffs with the kindness required by their circumstances, by denying them due process in the disciplinary hearing process, by denying them food and medicine, and by confining them in the DDU for extended periods of time.

5. Plaintiffs' claims in Count IX of the Amended Complaint under 42 U.S.C. § 1983, that Defendants violated the United States Constitution by denying them access to the courts and access to an adequate law library or adequate assistance from persons trained in the law.

6. Plaintiffs' claim in Count X of the Amended Complaint that Defendants violated Article XI of the Massachusetts Declaration of Rights by denying them access to the courts and access to an adequate law library or adequate assistance from persons trained in the law.

7. Plaintiffs' claim in Count XI of the Amended Complaint that the Defendants, and persons under their supervision, have interfered with plaintiffs' enjoyment of rights secured by the laws of the Commonwealth, the Constitutions of the United States and the Commonwealth, through the use of threats, intimidation or coercion in violation of M.G.L. x. 12, § 11H and 11I.

8. Plaintiffs' claim in Count XII of the Amended Complaint under 42 U.S.C. § 1983, that Defendants violated the Fourteenth Amendment to the United States Constitution by denying plaintiffs' constitutional right to due process by the procedure for sentencing inmates to the DDU, and by the imposition of disciplinary measures once in the DDU.

9. Plaintiffs' claim in Count XIII of the Amended Complaint that Defendants violated Part II, c. I, § 1, Article 4 of the Massachusetts Constitution and Articles 1, 10 and 12 of the Massachusetts Declaration of Rights, by denying them due process in the procedure by which prisoners are sentenced to the DDU, and by the imposition of disciplinary measures once in the DDU.

Entry of final judgment on the foregoing claims shall be without prejudice to Plaintiffs who may assert individual claims regarding particular violations, inadequacies or injuries, as provided in the Court's order dated February 10, 1997.

Subject to further order of the Court, all claims and counts not otherwise decided above are stayed.

Done and entered at Boston, Massachusetts, this 29th day of July, 997.

/s/_____
Peter M. Lauriat
Justice of the Superior Court

APPENDIX D

Supreme Judicial Court for
the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Scott P. Lewis, Esquire
Palmer & Dodge
1 Beacon Street
Boston, MA 02108

RE: No. SJC-07633
VICTOR TORRES & others
vs.
COMMISSIONER OF CORRECTION & others

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the Court and is denied.

Jean M. Kennett, Clerk

Dated: June 26, 1998

To: Scott P. Lewis, Esquire
Laurie S. Gill, Esquire
Joseph J. Laferrera, Esquire
John Reinstein, Esquire
Thomas O. Bean, Special A.A.G.
Suffolk Superior Court Dept.
George Nassar

Supreme Court, U.S.
FILED
OCT 26 1998
OFFICE OF THE CLERK

(2)

No. 98-0504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998.

VICTOR TORRES, ET AL.,
Petitioners,

v.

COMMISSIONER OF CORRECTION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SCOTT HARSHBARGER
Attorney General
of Massachusetts

JOHN E. BOWMAN, JR.
Counsel of Record
Assistant Attorney General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext. 2075

October 23, 1998

23 pp

Table of Contents.

Table of Authorities. ii

Statement Of The Case. 1

I. PROCEEDINGS BELOW. 1
II. RELATED LAWSUIT. 3
III. CONDITIONS AT THE DDU. 3

Reasons For Denying The Writ. 5

I. THERE IS NO CONFLICT OF DECISIONS TO WARRANT CERTIORARI. 5
II. THE CASE LACKS NATIONAL IMPORTANCE BECAUSE THE PETITIONERS POSE A PROCEDURAL OBJECTION TO A DECISION THAT IS NOT FINAL AND BECAUSE EIGHTH AMENDMENT RIGHTS ARE WELL ESTABLISHED. 9
III. THIS COURT LACKS JURISDICTION BECAUSE THE STATE COURT PROCEEDINGS ARE NOT YET COMPLETE. . . 11

Conclusion. 13

Table of Authorities.

Cases.

Bell v. Wolfish,
441 U.S. 520 (1979) 8

Caldwell v. Mississippi,
472 US. 320 (1985) 9n.10

Canton v. Harris,
489 U.S. 378 (1989) 5

Commonwealth v. James Clark,
8 Mass. L. Rptr. 97 (April 6, 1998) 3

Copeland v. Lanham,
1994 WL 64748 (4th Cir. 1994) 7n.8

Cox Broadcasting Corp., v. Cohn,
420 U.S. 469 (1975) 11, 11n.11

Del Raine v. Williford,
32 F.3d 1024 (7th Cir. 1994) 7

Estelle v. Gamble,
429 U.S. 97 (1976) 5

Farmer v. Brennan,
511 U.S. 825 (1994) 7, 10, 10n.11, 11

Ferdik v. Gaspar,
1994 WL 127166 (9th Cir. 1994) 6n.7

Fox Film Corp., v. Muller,
296 U.S. 207 (1935) 9n.10

Goldyn v. Moran,
1997 WL 545484 (9th Cir. 1997) 6n.6

Hamilton v. Leavy,
117 F.3d 742 (3d Cir. 1997) 7n.8

Helling v. McKinney,
509 U.S. 25 (1993) 2n.2, 5, 6, 7, 8, 10

Hudson v. Palmer,
468 U.S. 517 (1984) 11

Jacobs v. Young,
1997 WL 809925 (6th Cir. 1997) 6n.6

Jensen v. Clarke,
94 F.3d 1191 (8th Cir. 1996) 7n.8

LaBounty v. Coughlin
137 F.3d 38 (2d Cir. 1998) 6n.7

Lewis v. Casey,
518 U.S. 343 (1996) 5

Oliver v. Deen,
77 F.3d 156 (7th Cir. 1996) 6n.6

Procunier v.Martinez,
416 U.S. 396 (1974) 10

Rhodes v. Chapman,
452 U.S. 337 (1981) 4n.5, 8, 11, 11-12

Torres v. Commissioner of Correction,
427 Mass. 611, 395 N.E.2d 200 (1998) . . . . . passim

Turner v. Safley,
482 U.S. 78 (1987) 10

Wilson v. Seiter,
501 U.S. 294 (1991) 10, 12

Statutes, Regulations & Court Rules.

28 U.S.C. § 1257 11

Supreme Court Rule 10 6

Supreme Court Rule 10(b) 5, 8

Supreme Court Rule 10(c) 9

Fourth Circuit Local Rule 36(c) 7

Sixth Circuit Rule 24(c) 7

Ninth Circuit Rule 36-3 7

Mass. R. Civ. P. 54(b) 1n.1

Mass. R. Civ. P. 56(c) 9n.10

Miscellaneous.

U.S. Const. amend. VIII . . . . . passim

Statement Of The Case.

I. PROCEEDINGS BELOW.

Eleven inmates challenged their confinement in the Department Disciplinary Unit ("DDU"), which opened in 1992, at the Massachusetts Correctional Institute at Cedar Junction, a state prison accredited by the National Commission on Correctional Health Care in 1994. App. to Cert. Petn., pp. A19, A25. They asserted claims under the Eighth Amendment's cruel and unusual punishment clause as well as claims under other federal and state constitutional provisions and state statutes.

The petitioners filed an interlocutory appeal[1] from the trial court's decision (reproduced at App. to Cert. Petn., pp. A13-A79) granting *partial* summary judgment to the respondents (collectively, the Massachusetts Department of Correction) on the claims for *systemic* relief. See App. to Cert. Petn., pp. A15

---

[1]The trial court allowed the petitioners' motion for entry of separate and final judgment under Mass. R. Civ. P. 54(b), which allowed them to take an immediate appeal without waiting for entry of a final judgment after trial. App. to Cert. Petn., pp. A84-A86. The trial court's Rule 54(b) order expressly reserved the petitioners' right to proceed on their individual claims before the trial court. Id. at A86. The respondents did not appeal from the entry of partial summary judgment against them on the statutory duty of another state agency, the Department of Mental Health, to supervise periodic medical and psychiatric examinations in the DDU. See App. to Cert. Petn., pp. A29-A34.

("systemic challenge"), A75 ("systemic violations"). The Massachusetts Supreme Judicial Court ("SJC") affirmed the trial court's decision denying systemic relief. The SJC's decision rested on the objective component established by this Court's Eighth Amendment cases, as it concluded that there is "no factual dispute over the conditions endured by DDU inmates." 427 Mass. at 614, 695 N.E.2d at 203, App. to Cert. Petn., p. A5. The SJC accordingly did not address the petitioners' claim that there was a factual dispute on the subjective, or "deliberate indifference," component for the Eighth Amendment claims. 427 Mass. at 615 n.7, 695 N.E.2d at 204, n.7, App. to Cert. Petn., pp. A6-A7 n.7.[2]

The inmates immediately petitioned for certiorari, rather than proceeding to a trial on the merits of their remaining federal and state law claims. With respect to the Eighth Amendment claims in particular, the state trial court had expressly excluded the inmates' "individual claims" from its partial summary judgment on their challenge to the conditions of their confinement in the DDU. App. to Cert. Petn., pp. A38, A46, A75, A76-A78, A86.[3] The individual claims were not resolved by the SJC's decision on the interlocutory appeal and are still pending before the trial court.

---

[2]This approach to Eighth Amendment conditions of confinement cases was approved in Helling v. McKinney, 509 U.S. 25, 35 (1993).

[3]The trial court also determined that "trial is necessary" on petitioners' inadequate food claim. App. to Cert. Petn., p. A41.

II. Related Lawsuit.

In its decision in this case, the SJC took notice of a lawsuit in which other inmates concurrently challenged their confinement in the DDU. 427 Mass. at 616 n.8, 695 N.E.2d at 204 n.8, App. to Cert. Petn., p. A7 n.8. In that case, another state trial court judge ruled, after an eight-day trial on the merits and a view of the DDU,[4] that there was no Eighth Amendment violation. Dr. Stuart Grassian -- the same expert proffered by the petitioners here (Cert. Petn., pp. 6, 8, 9, 10, 19) testified at the trial in that case, but his conclusions on the effects of confinement in the DDU were rejected by the trial judge. Commonwealth v. James Clark, et al., 8 Mass. L. Rptr. 97, 102 (April 6, 1998) (Norfolk Superior Court No. 97-4079).

III. Conditions At The DDU.

The following description of conditions in the DDU is extracted from the SJC's decision. 427 Mass. at 612-613, 695 N.E.2d at 202-203, App. to Cert Petn., pp. A2-A4.

The Department Discipline Unit (DDU) is a modern, secure facility that is used to house inmates who, after a hearing, are found to have committed serious disciplinary infractions while incarcerated. Each inmate is housed alone in an eighty-four

---

[4]The trial judge in this case also took an "extensive view" of the DDU before entering partial summary judgment. App. to Cert. Petn., p. A17.

square foot cell[5] which contains its own window as well as a toilet, sink, bed, and desk. After an initial period in the DDU without further infractions, inmates may also have a radio and television in their cells, make four one-half hour telephone calls per month and have four one-hour noncontact visits per month. From their cells, inmates have access to reading materials and the prison law library.

Inmates have five hours of outdoor exercise each week and leave their cells three times weekly to shower. They receive hourly visits from correction officers, daily visits from the DDU director and captain, and four daily visits from medical personnel. Religious and mental health staff make rounds in the DDU each week. Inmates may speak with each other while in their cells and in the exercise yard.

---

[5]By way of comparison, this Court found there was no Eighth Amendment violation when inmates were double-bunked in sixty-three square foot cells. Rhodes v.Chapman, 452 U.S. 337, 341 (1981).

Reasons For Denying The Writ.

I. There Is No Conflict Of Decisions To Warrant Certiorari.

As the petitioners concede, this is the "first decision" on the constitutionality of control units at federal and state prisons. Cert. Petn., p. 19. Thus, there is no conflict of decisions justifying certiorari under Supreme Court Rule 10(b).

The petitioners seek to avoid this barrier by suggesting that there is a conflict with a decision by this Court and with several decisions by federal courts of appeals. However, the supposed conflict between the SJC's decision and Helling v. McKinney, 509 U.S. 25 (1993), disappears when one distinguishes between systemic (or facial) and individual (or as-applied) challenges to prison conditions under the Eighth Amendment to the United States Constitution. See Lewis v. Casey, 518 U.S. 343, 357, 360 (1996) (individual injury in prison library case does not support systemic relief); Canton v. Harris, 489 U.S. 378, 390-391 (1989) (municipal liability does not arise from an otherwise sound program that has occasionally been negligently administered).

The petitioners improperly compare the partial summary judgment limited to systemic claims entered in this case to the inmate's Eighth Amendment claim in Helling that his involuntary exposure to environmental tobacco smoke ("ETS") during his imprisonment caused personal health problems. 509 U.S. at 27-28. Helling presents an individual claim that is the progeny of the holding in Estelle v. Gamble, 429 U.S. 97 (1976), that an inmate

can sue under the Eighth Amendment for a prison official's "deliberate indifference" to his "serious medical needs." Id. at 104.

The SJC's decision is consistent with Helling because it allows the petitioners to proceed to a trial on the merits of their individual claims that they have sustained psychological injury as a result of their confinement in the DDU. See App. to Cert. Petn., pp. A38, A46, A75, A76-A78, A86. Nor does the SJC's decision preclude the petitioners from offering expert testimony at trial in connection with their individual claims. In other words, the petitioners can proceed to trial and can present testimony by Dr. Grassian without the need for intervention by this Court.

Likewise, the federal courts of appeals cases cited by the petitioners (Cert. Petn., pp. 11-13) as conflicting decisions under Supreme Court Rule 10 involve individual, rather than systemic, claims under the Eighth Amendment. Indeed, three of the decisions[6] involve second-hand smoke, or ETS, medical claims by individual prisoners that were at issue in Helling and two other decisions[7] present different individual medical claims that the

---

[6]Jacobs v. Young, 1997 WL 809925 (6th Cir. 1997) (unpublished opinion); Oliver v. Deen, 77 F.3d 156 (7th Cir. 1996); Goldyn v. Moran, 1997 WL 545484 (9th Cir. 1997) (unpublished opinion) (ETS and vaginal virus from dirty underwear).

[7]Ferdik v. Gaspar, 1994 WL 127166 (9th Cir. 1994); (unpublished opinion) (respiratory injury and back condition); LaBounty v. Coughlin, 137 F.3d 68 (2d Cir. 1998) (exposure to asbestos and dirty drinking water).

court of appeals analyzed under Helling. Three other decisions[8] present "failure-to-protect" physical safety claims by prisoners that implicate the Eighth Amendment under this Court's decision in Farmer v. Brennan, 511 U.S. 825 (1994). In the Seventh Circuit's opinion that the petitioners cite with approval, the court remanded the prisoner's claims for reconsideration in light of the intervening decision in Farmer and expressly stated that the lower court could rule on summary judgment prior to a trial on the merits. Del Raine v. Williford, 32 F.3d 1024, 1038 (7th Cir. 1994) (complaint of cold cell due to broken windows). Thus, it is not in conflict with the SJC's affirmance of partial summary judgment in this case.[9]

Moreover, four of the decisions that the petitioners rely on are unpublished opinions, which local court rules say cannot be cited as authority (except for reasons that are not relevant here). See Fourth Circuit Local Rule 36(c), Sixth Circuit Rule 24(c), Ninth Circuit Rule 36-3. Decisions that cannot even be cited to the issuing court of appeals, or to the district courts in the circuit,

---

[8]Hamilton v. Leavy, 117 F.3d 742 (3d Cir. 1997); Copeland v. Lanham, 1994 WL 64748 (4th Cir. 1994) (unpublished opinion); Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996).

[9]In addition, decisions by federal courts of appeals on whether lower federal courts properly applied the federal summary judgment rule are quite different from suggesting, as the petitioners do, that the same standards apply to state court use of a state summary judgment rule, which presents a question of state law that is not reviewable by this Court. See footnote 10 infra.

should not be the basis for establishing a conflict of decisions under Supreme Court Rule 10(b).

Finally, the petitioners' reliance on Helling as authority requiring the SJC to reverse the state trial court's grant of partial summary judgment is misplaced. While it is true that the Helling opinion appears to contemplate that the prisoner will use scientific opinion on remand in order to prove that involuntary exposure to ETS is the cause of his health problems, 509 U.S. at 27-28, 35, Helling also warns that the objective component of an Eighth Amendment claim "requires more than a scientific and statistical inquiry." Id. at 36. What is required is for a "*court* to assess whether society considers the risk . . . so grave that society considers that it violates contemporary standards of decency." Id. (emphasis added). In this case the SJC did just that: it determined that the undisputed conditions at the DDU did not violate contemporary standards of decency. Nevertheless, the petitioners still have an opportunity to prove at trial that, as applied to individual inmates, the conditions might violate the Eighth Amendment. Both Helling and the SJC's decision are consistent with Rhodes v. Chapman, 452 U.S. 337, 348 n.13 (1981) (lower courts "erred in assuming that opinion of experts as to desirable prison conditions suffice to establish contemporary standards of decency") and Bell v. Wolfish, 441 U.S. 520, 543-544 n.27 (1979) (expert opinions "simply do not establish the constitutional minima").

II. THE CASE LACKS NATIONAL IMPORTANCE BECAUSE THE PETITIONERS POSE A PROCEDURAL OBJECTION TO A DECISION THAT IS NOT FINAL AND BECAUSE EIGHTH AMENDMENT RIGHTS ARE WELL ESTABLISHED.

The relief that the petitioners seek is limited. They ask this Court to hold that the Massachusetts courts erred when they decided there was no genuine issue of material fact that barred entry of partial summary judgment on some claims in the case under the Massachusetts Rules of Civil Procedure. On this basis they ask that this Court remand the case to the Massachusetts courts for a "right to a trial" at which their expert, Dr. Stuart Grassian, can testify. Cert. Petn., pp. 3, 6, 8.[10] As already noted, however, the SJC's decision does not bar the petitioners from proceeding to trial on their individual claims under the Eighth Amendment. Viewed in context, the case fails the "important question of federal law" test under Supreme Court Rule 10(c).

---

[10]In their interlocutory appeal the petitioners asked that the SJC rule that the state trial court erred when it found that there was "no genuine issue as to any material fact" under Mass. R. Civ. P. 56(c) and that it was therefor improper to rule on eight of the thirteen counts in the complaint under the state summary judgment procedure. The SJC held that the trial court acted correctly under Mass. R.Civ. P. 56(c). 427 Mass. at 613-614, 695 N.E.2d at 203, App. to Cert. Petn., pp. A4-A5. The petitioners' procedural objection is a matter of state law that this Court lacks jurisdiction to review. Fox Film Corp., v. Muller, 296 U.S. 207, 211 (1935) (state contract law); Caldwell v. Mississippi, 472 U.S. 320, 327 (1985) (state procedural rule).

The case also lacks national importance because this Court has addressed the elements of Eighth Amendment claims in a number of recent decisions. E.g., Wilson v. Seiter, 501 U.S. 294 (1991); Helling v. McKinney, 509 U.S. 25 (1993); Farmer v. Brennan, 511 U.S. 825 (1994). The SJC's decision applies this Court's tests, starting with the "objective component of an Eighth Amendment prison claim (Was the deprivation sufficiently serious?)." Seiter, 501 U.S. at 298.[11] Recognizing that there was "no factual dispute over the conditions endured by the DDU inmates," the SJC determined that there was no systemic violation of Eighth Amendment standards. 427 Mass. at 614, 695 N.E.2d at 203, App. to Cert. Petn., p. A5. The petitioners agree with the SJC that there is "no significant dispute about the actual physical conditions of confinement in the DDU." Cert. Petn., p. 6.

The certiorari petition also overlooks the deference owed the "legislative and executive branches of government," especially "[w]here a state penal system is involved," given the "complex and intractable" problems of running a prison. Turner v. Safley, 482 U.S. 78, 84, 85 (1987). See also Procunier v. Martinez, 416 U.S. 396, 404 (1974) ("hands-off attitude toward problems of prison administration"). Particularly pertinent to this case is the fact that, as the trial court found, each of the petitioners was "assigned to the DDU after being found guilty of committing a major disciplinary violation while incarcerated," including

---

[11]The SJC 's decision quoted the formulation of the objective component from Farmer, 511 U.S. at 834 (whether the "conditions of confinement present 'a substantial risk of serious harm'"). 427 Mass. at 613-614, 695 N.E.2d at 203, App. to Cert. Petn., p. A4.

"stabbing another inmate" as well as "attempting to attack another inmate" in the DDU. App. to Cert. Petn., p. A14. Responsibility for the safety of other inmates is a constitutional obligation of state prison officials under this Court's Eighth Amendment "failure-to-protect" cases. E.g., Farmer, 511 U.S. at 828, 832, 849; Hudson v. Palmer, 468 U.S. 517, 526-527 (1984) ("take reasonable measures to guarantee the safety of the inmates"). It would be untoward to intrude into the delicate balance between the secure confinement of the petitioners in the DDU and the personal safety of other inmates before the state court litigation has ended. See Rhodes v. Chapman, 452 U.S. at 339 ("Constitution does not mandate comfortable prisons") id. at 349 n.14 ("prison's internal security is peculiarly a matter normally left to the discretion of prison administrators"); Farmer, 511 U.S. at 830 (transsexual prisoner placed in segregation due to "safety concerns").

III. This Court Lacks Jurisdiction Because The State Court Proceedings Are Not Yet Complete.

This Court has jurisdiction to review only "final judgments" by state courts. 28 U.S.C. § 1257. Even though Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-485 (1975), illustrates that the finality rule is sometimes a permeable barrier, at the very least it counsels hesitation in granting certiorari before the state court proceedings are complete.[12] This is especially true

---

[12]The respondents' view is that none of Cox Broadcasting's exceptions to the final judgment rule apply to this case. The respondents agree, however, that there will be no further state

in the context of an Eighth Amendment prison conditions case where the Court has said that it must "proceed cautiously." Rhodes v. Chapman, 452 U.S. at 351.

Adherence to the finality rule is peculiarly appropriate in this case where, as noted earlier, there will be further state court proceedings on the petitioners' individual Eighth Amendment challenges to their confinement in the DDU -- the same constitutional provision on which they seek certiorari. Indeed, it appears that the petitioners can still present at trial the exact claims that they highlight on pages 6-7 of their petition as warranting certiorari. And if the petitioners were to sustain their burden of proof at trial, the respondents might still prevail on the subjective, or culpable state of mind, component of the Eighth Amendment claim. Seiter, 501 U.S. at 299-301. The future state court proceedings might, therefor, either reframe the constitutional question, obviate the need for review of the constitutional question, or avoid the possibility of a second request for review by this Court.

---

court proceedings on the *systemic* claims that the petitoners presented to the SJC on their interlocutory appeal, due to the operation of Mass. R. Civ. P. 54(b).

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari to the Massachusetts Supreme Judicial Court should be denied.

Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL FOR
THE COMMONWEALTH OF
MASSACHUSETTS

John E. Bowman, Jr., BBO# 051900
Assistant Attorney General
Government Bureau
One Ashburton Place, Room 2019
Boston, MA 02108-1698
(617) 727-2200, ext. 2075
Fax: (617) 727-5785

Dated: October 23, 1998

ADDENDUM

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Mass. R. Civ. P. 54(b)

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Mass. R. Civ. P. 56(c)

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

REPRINTED COPY

(3)

FILED
NOV 5 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-0504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VICTOR TORRES, ET AL.,
Petitioners,

v.

COMMISSIONER OF CORRECTION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN REINSTEIN
American Civil Liberties
Union of Massachusetts
99 Chauncy Street
Boston, MA 02111
(617) 482-3170

SCOTT P. LEWIS
Counsel of Record
LAURIE S. GILL
LORI B. SILVER
PALMER & DODGE LLP
One Beacon Street
Boston, MA 02108
(617) 573-0100

Counsel for Petitioners

November 4, 1998

9 pp

TABLE OF CONTENTS

Page

I. THE SUPREME JUDICIAL COURT'S DECISION IS FINAL FOR PURPOSES OF REVIEW BY CERTIORARI. 2

A. The Judgment At Issue Is Final And Not Subject To Further Review In State Court. 3

B. The Petitioners Will Not Have Any Opportunity To Press Their Eighth Amendment Claims If Certiorari Is Denied 3

II. THIS CASE PRESENTS ISSUES WORTHY OF REVIEW 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

Canton v. *Harris*, 489 U.S. 378 (1989) 5n

Commonwealth v. *Clark*,
8 Mass. L. Rptr. 97 (April 6, 1998) 2n

Farmer v. *Brennan*, 511 U.S. 825 (1994) 6

Gibbs Ford, Inc. v. *United Truck Leasing Corporation*, 399 Mass. 8,
502 N.E.2d 508 (1987) 3

Helling v. *McKinney*, 509 U.S. 25 (1993) 4, 5

Lewis v. *Casey*, 518 U.S. 343 (1996) 5n

Market Street R. Co. v. *Railroad Comm'n of Cal.*,
324 U.S. 548 (1945).....2

Procunier v. *Martinez*, 416 U.S. 396 (1974) 5

Turner v. *Safley*, 482 U.S. 78 (1987) 5

Statutes and Rules:

28 U.S.C. § 1257 2

Mass. R. Civ. P. 54(b) 3

No. 98-0504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VICTOR TORRES, ET AL.,

Petitioners,

v.

COMMISSIONER OF CORRECTION, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In their opposition to the petition for certiorari, the respondents misrepresent the procedural posture of this petition for review in an effort to convince the Court that it does not have jurisdiction to review this case. The Court's examination of the merits of the petition should not be obscured by the respondents' smokescreens. The Supreme Judicial Court's misguided decision in this case represents a

final judgment that this Court has both jurisdiction and reason to review.[1]

I. THE SUPREME JUDICIAL COURT'S DECISION IS FINAL FOR PURPOSES OF REVIEW BY CERTIORARI.

The decision of the Supreme Judicial Court ("S.J.C.") is a final decision within the meaning of 28 U.S.C. § 1257. Section 1257 allows this Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution." For purposes of this statute, a final judgment is one that is not subject to further review or correction in any other state tribunal and represents "the final word of a final court." *Market Street R. Co.* v. *Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945).

---

[1] The respondents attempt to confuse this Court by describing as a "related lawsuit" an entirely inapposite Massachusetts trial court decision. The uncontroverted record in the Supreme Judicial Court showed that the decision in *Commonwealth* v. *Clark*, 8 Mass. L. Rptr. 97, 102 (April 6, 1998), was on motions to dismiss pending *criminal indictments* by prisoners who claimed that a disciplinary sentence to the DDU as a result of prison misconduct would bar a later criminal prosecution for the same misconduct on the basis of double jeopardy. No party presented (or could have presented) in their criminal prosecutions claims under the Eighth Amendment that the conditions of confinement in the DDU are themselves unconstitutional. The Department of Correction did not argue, and the Supreme Judicial Court did not hold, that the trial court decision in *Clark* should have any impact on the disposition of this case.

A. The Judgment At Issue Is Final And Not Subject To Further Review In State Court.

There is no question under Massachusetts law that a judgment entered under Mass. R. Civ. P. 54(b), like a judgment entered under the parallel provision of the Federal Rules, is a final judgment for all purposes and, as such, was subject to review on appeal by the Supreme Judicial Court. *See Gibbs Ford, Inc.* v. *United Truck Leasing Corporation*, 399 Mass. 8, 11, 502 N.E.2d 508, 510 (1987). As respondents concede (at 1 n.1), the trial court made the specific determinations required by Rule 54(b), and directed the entry of final judgment with regard to the claims asserted in Count I that respondents violated the Eighth Amendment by deliberately creating an environment of sensory deprivation that they knew was likely to cause harm to DDU inmates. App. A84-85. The respondents have never contended that the state's highest court lacked jurisdiction to hear the appeal or that further review of the S.J.C's decision is available in a state tribunal.

B. The Petitioners Will Not Have Any Opportunity To Press Their Eighth Amendment Claims If Certiorari Is Denied.

In affirming the trial court's judgment, the S.J.C. categorically rejected the petitioners' claims under the Eighth Amendment that the conditions of confinement in the DDU pose an intolerable risk of serious psychological harm. App. A4-6. The S.J.C. did not differentiate in any way between "systemic" or "individual" proof or preserve the rights of any of the petitioners to pursue injunctive or declaratory relief on these critical claims. Given the S.J.C.'s decision that, as a matter of law, the risk of psychological harm created by the conditions of DDU confinement does

not violate the Eighth Amendment, the trial court would never entertain claims by individual petitioners that they are entitled to Eighth Amendment relief from the intolerable conditions of confinement in the DDU or that the operation of the DDU must be altered to meet constitutional requirements. The respondents would surely argue that any Eighth Amendment claims of that kind are barred by the S.J.C.'s decision. This Court should not indulge the respondents' attempt to place petitioners in the untenable position of being unable to obtain review now because of misplaced finality concerns and later being unable to obtain review after all other claims are tried because the time in which to seek review of the S.J.C.'s decision has lapsed.

II. THIS CASE PRESENTS ISSUES WORTHY OF REVIEW.

The S.J.C.'s decision is in direct conflict with *Helling* v. *McKinney*, 509 U.S. 25 (1993), which held that factual disputes about whether prison conditions pose a substantial risk of serious harm must be resolved before a court can determine as a matter of law whether Eighth Amendment rights have been violated. *See* Pet. at 10-11. The respondents' argument that the Eighth Amendment approach to individual claims articulated in *Helling* somehow does not apply to systemic claims is not supported by any reasoned analysis or precedent.[2]

---

[2] The respondents' characterization of the petitioners' claims as a "facial," rather than "as-applied," attack on the DDU, like their purported distinction between "individual" and "systemic" claims, is meaningless because petitioners challenge the conditions under which they are actually confined.

In *Helling*, the Court reversed the dismissal of a claim involving exposure to second-hand tobacco smoke because it found that it was "premature" to rule as a matter of law that the risk of harm was not sufficiently grave to implicate a "serious medical need" or that forced exposure to second-hand smoke is consistent with "current standards of decency." *Id.* at 34. The essence of *Helling* is that the magnitude of the risk must be resolved as a matter of fact *before* a court can properly judge as a matter of law whether it can be tolerated under the Eighth Amendment. This fundamental principle has nothing to do with whether claims are asserted on an individual or systemic basis.[3] In the face of petitioners' expert testimony underscoring the gravity of the risk presented by long-term confinement in the DDU, the S.J.C.'s determination that the risk of psychological harm posed by DDU conditions did not, as a matter of law, violate the Eighth Amendment cannot be reconciled with the holding in *Helling*.

Neither *Turner* v. *Safley*, 482 U.S. 78 (1987), nor *Procunier* v. *Martinez*, 416 U.S. 396 (1974), involved Eighth Amendment claims. There is no basis for the respondents'

---

[3] Neither *Lewis* v. *Casey*, 518 U.S. 343 (1996), nor *Canton* v. *Harris*, 489 U.S. 378 (1989), suggests, much less holds, that the *Helling* standard does not apply to Eighth Amendment claims seeking prospective injunctive relief to prevent harm from occurring as a result of intolerable conditions of confinement. *Lewis* merely stands for the proposition that the scope of injunctive relief should be tailored to the extent of the established violation. *Canton* deals with the standards for imposing liability on a municipality for inadequate training of police officers. This case does not involve negligent administration of an otherwise sound prison program. The Eighth Amendment claim here challenges the intentionally punitive conditions of confinement in the DDU.

assertion that the problems of dealing with difficult prisoners somehow immunize their administration of the DDU from meaningful review under the Eighth Amendment. *Farmer* v. *Brennan*, 511 U.S. 825 (1994), reaffirms that *all* inmates have a right to seek relief under the Eighth Amendment when their conditions of confinement pose an intolerable risk of serious harm. The S.J.C.'s decision — that a court can determine, as a matter of law, that the risk to inmates in "supermax" prisons is acceptable without ever considering their proof that serious psychological harm has been and will continue to be caused by their conditions of confinement — presents an issue of national importance that should be reviewed by this Court.

CONCLUSION

For all the reasons offered here and in the petition, a writ of certiorari should issue.

Respectfully submitted,

JOHN REINSTEIN
American Civil Liberties
Union of Massachusetts
99 Chauncy Street
Boston, MA 02111
(617) 482-3170

SCOTT P. LEWIS
Counsel of Record
LAURIE S. GILL
LORI B. SILVER
PALMER & DODGE LLP
One Beacon Street
Boston, MA 02108
(617) 573-0100

Counsel for Petitioners

November 4, 1998